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IN THE

Supreme Court of the United States

CLEANCOALITION; ROBERTSON COUNTY: OUR LAND, OUR LIVES,

Petitioners,

v.

TXU POWER, doing business as TXU GENERATION COMPANY LP; OAK GROVE MANAGEMENT COMPANY LLC; and TXU CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This matter relates to Clean Air Act ("CAA" or "Act") section 304(a)(1) and 304(a)(3), 42 U.S.C. § 7604(a)(1) and 7604(a)(3). Petitioners CleanCOALition and Robertson County: Our Land, Our Lives (collectively, "CleanCOALition") contend Congress: (1) enacted CAA section 304(a)(1) to allow private citizens to, *inter alia*, stop violations of the CAA that can occur before a person obtains a CAA permit, and (2) enacted CAA section 304(a)(3) to allow citizens to stop persons from constructing CAA facilities without permits that comply with the CAA. Various courts, including the courts in this matter, have disagreed with these constructions of the statutory provisions. In so doing, CleanCOALition contends courts have eliminated causes of action central to Congress's intended objectives under and enforcement of the CAA.

The district court in this matter held, though there is conflict between courts, the *Burford* abstention doctrine is a valid basis for courts to forgo jurisdiction over section 304 citizen suits. The questions presented for review therefore are as follows:

1. Whether CAA section 304(a)(1) authorizes a citizen suit to redress violations that occur before a person obtains a CAA permit.

2. Whether CAA section 304(a)(3) authorizes a citizen suit against entities that propose to construct or construct a CAA facility without a permit that complies with the CAA.

3. Whether the "abstention" doctrine created in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), is inapplicable to CAA citizen suits as a matter of law.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules 14.1(b) and 29.6, Petitioners CleanCOALition state they do not have a parent corporation, and no publicly held corporation owns 10% or more of CleanCOALition.

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Courts (including the United States Court of Appeals for the Fifth Circuit and district court in this matter) have established precedents that subvert Congress's creation of causes of action central to enforcement of the CAA. This has prevented CleanCOALition, and otherwise will prevent citizens, from enforcing Congress's objectives under the CAA. CleanCOALition therefore respectfully requests that the Court grant this Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *CleanCOALition v. TXU Power*, 536 F.3d 469 (5th Cir. 2008) and reproduced herein as Appendix ("Appx.") Exhibit A. The opinion of the district court is not reported, but it is reproduced herein as Appx. Exhibit B.

JURISDICTIONAL STATEMENT

Respondents TXU Power, Oak Grove Management Company LLC, and TXU Corp. (collectively, "TXU") are violating CAA emissions standards and limitations and propose to construct a CAA facility without a permit that complies with the CAA. On December 1, 2006, CleanCOALition sued TXU in the district court under CAA section 304(a)(1) and 304(a)(3), 42 U.S.C. § 7604(a)(1) and 7604(a)(3).

The district court dismissed CleanCOALition's claims by Order dated May 21, 2007. *See* Appx. Exhibit B. CleanCOALition appealed to the United States Court of Appeals for the Fifth Circuit.

On July 21, 2008, the Fifth Circuit affirmed the district court's dismissal of CleanCOALition's claims. *See* Appx. Exhibit A. CleanCOALition did not seek rehearing of the Fifth Circuit's ruling, and it has not sought extensions of time to file its Petition for Writ of Certiorari in this Court.

Under 28 U.S.C. § 1254(1), this Court has jurisdiction to review, on a writ of certiorari, the Fifth Circuit's July 21, 2008 ruling.

STATUTE INVOLVED

The relevant statute in this matter is CAA section 304, 42 U.S.C. § 7604, which provides:

> (a) Authority to bring civil action; jurisdiction
>
> . . . any person may commence a civil action on his own behalf—
>
> > (1) against any person . . . who is alleged to have violated . . . or to be in violation of . . . an emission standard or limitation under this chapter . . .
> >
> > (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter

I of this chapter (relating to nonattainment) or who is alleged to have violated . . . or to be in violation of any condition of such permit.

. . .

(f) . . .

For purposes of this section, the term "emission standard or limitation under this chapter" means—

. . .

(3) any condition or requirement of a permit under part C of subchapter I of this chapter . . . ; or

(4) any other standard, limitation, or schedule established . . . under any applicable State implementation plan . . ., [or] any permit term or condition . . . .

STATEMENT OF THE CASE

A. Bases for CleanCOALition's Citizen Suit

Appellants CleanCOALition are environmental interest groups whose members are concerned with the environmental health of the Southwest United States, including air quality.[1] Appellees TXU are utility interests that propose to construct a pulverized coal-fired power plant in Robertson County, Texas.[2] CleanCOALition's members reside in Robertson County, and elsewhere, and will be adversely affected by emissions from TXU's proposed plant.[3]

CleanCOALition sued TXU under CAA section 304(a)(1) and 304(a)(3), because TXU has violated emissions standards and limitations mandated by the CAA.[4] TXU also proposes to construct its power plant without a permit that complies with the CAA.[5]

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[1] Record on Appeal ("ROA"), pp. 2-3. As permitted by Supreme Court Rule 12.7, CleanCOALition cites the ROA maintained by the clerks of the lower courts.

[2] ROA, pp. 1, 5-6, 10, 11. The plant name is Oak Grove Steam Electric Station.

[3] ROA, pp. 3-5.

[4] ROA, pp. 1-44.

[5] *Id.*

B. The CAA Permitting Process

The United States Environmental Protection Agency ("EPA") authorizes states, including Texas, to issue permits for the construction of CAA facilities. *See* 42 U.S.C. § 7410(a)(2)(C).[6] The air permitting process in Texas is administered by the Texas Commission on Environmental Quality ("TCEQ").[7]

The TCEQ may issue several types of permits under the CAA, but the permit relevant to this matter is a construction permit issued pursuant to the CAA's Prevention of Significant Deterioration ("PSD") rules. *See* 42 U.S.C. §§ 7470-7492. The TCEQ implements these rules, as well as other provisions of the CAA, through a compilation known as the Texas "State Implementation Plan" (the "SIP"). *See generally* 42 U.S.C. § 7410(a)(2)(C).

C. TXU's PSD Permit and Related Obligations

In July and December 2005, TXU submitted applications to the TCEQ seeking a PSD permit to construct its proposed power plant.[8] In connection with its efforts to obtain the PSD permit, TXU was obligated, but failed, to satisfy "conditions and requirements" that are prerequisites for obtaining a valid PSD permit. For

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[6] This authorization does not grant, however, states jurisdiction over CAA citizen suits. Congress mandated such suits should be litigated in federal court. *See* 42 U.S.C. § 7604(a).

[7] ROA, pp. 100-105.

[8] ROA, pp. 5-6. The TCEQ since has issued TXU a PSD permit.

instance, the PSD program requires compliance with the conditions and requirements found in part C of subchapter I of the CAA (CAA sections 160-169, 42 U.S.C. §§ 7470-7492), which obligate persons to, *inter alia*, demonstrate:

1. "emissions from construction or operation of [a] facility will not *cause, or contribute to*, air pollution in excess of" limits established under the CAA. 42 U.S.C. § 7475(a)(3) (emphasis added);

2. "the proposed facility is subject to the *best available control technology* . . . ." 42 U.S.C. § 7475(a)(4) (emphasis added);[9] and

3. "there has been an analysis of *any air quality impacts* projected for the area as a result of growth associated with such facility . . . ." 42 U.S.C. § 7475(a)(6) (emphasis added).

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[9] "The term 'best available control technology' means an *emission limitation* based on the maximum degree of reduction of each pollutant . . . which the permitting authority . . . determines is achievable . . . through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant." 42 U.S.C. § 7479(3) (emphasis added).

D. Timing of PSD Obligations

TXU was obligated to complete the foregoing, among other, conditions and requirements *before* it could receive a valid PSD permit. By way of example, the above-referenced conditions and requirements are accompanied by the admonition: "No major emitting facility . . . may be constructed . . . unless . . . the *proposed* permit has been subject to a *review* in accordance with this section . . . ." 42 U.S.C. § 7475(a)(2) (emphasis added).

Texas regulations implementing the CAA also provide: "In order to be *granted* a permit . . . the *application must include* . . . information which demonstrates that emissions from the facility . . . meet . . . Best available control technology . . . ." 30 TEX. ADMIN. CODE § 116.111(a)(2)(C) (emphasis added). The regulations also provide: "The following are the conditions upon which a permit . . . [is] *issued*: . . . representations with regard to construction plans and operation procedures in an *application* for a permit . . . ." 30 TEX. ADMIN. CODE § 116.116(a) (emphasis added).[10]

Accordingly, in practice, an entity that seeks to construct a CAA facility undertakes activities to satisfy PSD conditions and requirements before submitting a PSD permit application. The pre-permit stage therefore

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[10] *See also* 1976 *Texas State Implementation Plan* § XIV (Rules & Regulations) at Rule 603.1, found at http://www.tceq.state.tx.us/assets/public/implementation/air/sip/sipdocs/1976-SIP/1976_sip_section_xiv.pdf (enumerating what a CAA applicant *must* submit in an application and demonstrate *before* obtaining a PSD permit).

is when a person will either comply, or fail to comply, with the relevant PSD conditions and requirements.[11]

E. The Proceedings Below

TXU has violated the CAA, because it has not complied with the PSD conditions and requirements. The plain language of CAA section 304(a)(1) and 304(a)(3) authorized CleanCOALition's suit to redress these violations. The district court nevertheless dismissed CleanCOALition's claims under Federal Rule of Civil Procedure 12(b)(6), holding CleanCOALition failed to state claims upon which relief could be granted. The district court also held CleanCOALition lack standing, essentially because the court had concluded CleanCOALition could not assert claims under section 304(a)(1) and 304(a)(3). The district court finally held it would abstain from exercising jurisdiction over CleanCOALition's claims under the *Burford* abstention doctrine.

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[11] By way of example, the court in *New York v. Niagara Mowhawk Power Corp.* held:

> Implicit in the requirement that a facility be subject to [best available control technology] pursuant to 42 U.S.C. § 7475(a)(4) is an obligation on the part of the person proposing the construction or modification to obtain the appropriate [best available control technology] determination. [Defendant's] argument conveniently ignores the fact that the permitting authority never had the opportunity to determine [best available control technology] for the Facilities precisely because [Defendant] failed to follow the proper preconstruction procedures . . . .

263 F. Supp. 2d 650, 663 (W.D.N.Y. 2003).

The Fifth Circuit, as an issue of first impression, concluded section 304(a)(1) and 304(a)(3) does not support CleanCOALition's claims and affirmed the district court's 12(b)(6) dismissal.[12] These holdings, as well as holdings from other courts, not only have deprived CleanCOALition of viable causes of action, but also effectively write out of the CAA, provisions critical to its proper enforcement.

REASONS FOR GRANTING THE PETITION

A. Introduction

Congress enacted the CAA, 42 U.S.C. §§ 7401-7671q, with the objectives "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). These objectives are not mere surplusage or academic principles that can be ignored when interpreting the CAA. Indeed, under principles of statutory construction, a court's "duty . . . is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *Comm'r of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984) (internal quotations omitted).

Protection and enhancement of the Nation's air resources depends upon active citizen enforcement of

[12] The Fifth Circuit declined to address the standing issue or resolve whether *Burford* abstention is impermissible in CAA citizen suits. CleanCOALition has standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992), and abstention was improper for reasons discussed herein.

the CAA at a time when such enforcement can make a material difference. *See, e.g., Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974) ("citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike."). The window of opportunity in which citizens meaningful can enforce the CAA is, however, narrow. *See, e.g., Hempstead County Hunting Club v. Sw. Elec. Power Co.*, No. 08-CV-4038, 2008 WL 2705570, **2-3 (W.D. Ark. 2008) (holding that even before an entity receives a PSD permit, it is allowed to undertake "a good deal of activity" towards construction of a CAA facility).

Congress enacted CAA section 304(a)(1) and 304(a)(3) to allow citizens to stop, *inter alia*, CAA violations that become evident before an entity obtains a PSD permit or begins constructing a CAA facility. The lower courts in this matter, as well as other courts, nevertheless have held section 304(a)(1) and 304(a)(3) does not support such causes of action. *See, e.g., Weiler v. Chatham Forest Prods., Inc.*, 392 F.3d 532, 538 (2d Cir. 2004) ("a section 304(a)(1) suit can only be brought against a private defendant *after* a facility has been built and begun operation.") (emphasis added); *Sugarloaf Citizens Ass'n v. Montgomery County*, No. 93-2475, 1994 WL 447442, at *8 n.9 (4th Cir. August 17, 1994) (unpublished) ("[U]ntil construction is *completed* . . . [defendants] can neither begin emissions nor violate any emissions standard.") (emphasis added).

These holdings put Congress's objectives under the CAA in jeopardy, because they relegate the CAA to a civil penalties statute that penalizes CAA violators only

after they have committed to courses of action (and possibly even completed construction of facilities) that may be contrary to CAA mandates. The holdings in *Weiler* and *Sugarloaf* particularly are indicative of this, as the Second and Fourth Circuits do not allow private citizens to enforce the CAA until *after* a CAA violator completes a facility or begins operations. 392 F.3d at 538; 1994 WL 447442 at *8 n.9.[13] Considering the CAA contains enforcement provisions intended to prevent, as an initial matter, the construction and operation of facilities that do not comply with the CAA, *see* 42 U.S.C. § 7604(a), the *Weiler/Sugarloaf* approach does little to "to protect and enhance the quality of the Nation's air resources . . . ." 42 U.S.C. § 7401(b)(1).

This case consequently is not merely about the lower courts' denial of CleanCOALition's legitimate causes of action against TXU. The very operation and objectives of the CAA are jeopardized by these and other courts' holdings. The matters at issue in this Petition therefore directly implicate important issues of federal law that have not been, but should be, resolved by this Court. *See* Supreme Court Rule 10(c).

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[13] The Fifth Circuit declined to resolve whether it will force citizens to delay a section 304(a) suit until after a PSD permit is issued or construction of a facility is commenced. *See* Appx. Exhibit A, p. 20a, n.11.

B. Congress Enacted CAA Section 304(a)(1) to Allow Citizens to Sue to Stop Pre-permit Violations

TXU is violating PSD conditions and requirements that constitute emissions standards and limitations under the CAA. Because these violations were evident before TXU obtained a PSD permit, CleanCOALition sued TXU under CAA section 304(a)(1), which authorizes suit "against any person . . . who is alleged to have violated . . . or to be in violation of . . . an *emission standard or limitation under this chapter* . . . ." 42 U.S.C. § 7604(a)(1) (emphasis added).[14]

The fundamental dispute in the lower courts was whether section 304(a)(1) authorizes suit to redress pre-permit violations or only violations that occur after a PSD permit has been issued. The plain language of section 304(a)(1), and structure of the CAA, dictates section 304(a)(1) authorizes suit for pre-permit violations. The lower courts in this matter, as well as other courts, nonetheless have held no such cause of action exists. These holdings undermine Congress's intended operation of the CAA.

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[14] The "under this chapter" reference is to the entirety of the CAA, which formally is known as Chapter 85 of the Air Pollution Prevention and Control Act.

1. Pre-permit violations are actionable under the plain language of section 304(a)(1) and the structure of the CAA

The trigger for a section 304(a)(1) cause of action is the violation of an "emission standard or limitation under [the CAA]." Congress defined this phrase in CAA section 304(f):

> For purposes of this section, the term "emission standard or limitation under [the CAA]" means—
>
> . . .
>
> (3) any condition or requirement of a permit under part C of subchapter I of [the CAA] . . . ; or
>
> (4) any other standard, limitation, or schedule established . . . under any applicable State implementation plan [SIP]. . . .

42 U.S.C. § 7604(f).

The conditions and requirements found in part C of subchapter I of the CAA, as well as the standards and limitations contained in SIPs, impose mandates on entities that must be fulfilled before the entities can obtain a PSD permit. Section 304(f)(3) and 304(f)(4) therefore authorizes CleanCOALition's claims against TXU, and authorizes private citizens as a general matter to sue to stop CAA violations that occur before a PSD permit is issued.

This construction of section 304(f)(3) and 304(f)(4) is supported by the plain language and structure of the CAA.

a. Pre-permit conditions and requirements under part C of subchapter I of the CAA constitute actionable emissions standards or limitations

CleanCOALition has contended section 304(f)(3) makes literal sense only if it is read to operate as a directive that: (1) there are certain conditions and requirements (which relate to permits), (2) found in part C of subchapter I of the CAA, and (3) those conditions and requirements are incorporated as "emission standard[s] or limitation[s]" within the meaning of section 304(f)(3). In contrast, TXU has contended section 304(f)(3) means: (1) when a permit is issued under part C of subchapter I of the CAA, (2) the permit will contain certain conditions or requirements, and (3) only those permit conditions or requirements are incorporated as "emission standard[s] or limitation[s]" under section 304(f)(3). The critical questions that arise from these competing constructions is whether the phrase "condition or requirement" refers to permit conditions or requirements *found under* part C of subchapter I or whether it refers to only conditions or requirements in permits *issued* under part C of subchapter I.

CleanCOALition's construction is correct, because section 304(f)(3) contemplates citizen suits *before* a PSD permit is issued, because the conditions and requirements under part C of subchapter I include

conditions and requirements to *obtain* a PSD permit. *See generally* 42 U.S.C. § 7475(a)(3),(4), & (6) (creating the "cause, or contribute" "best available control technology," and "air quality impacts" pre-permit conditions and requirements); *see also supra* pp. 7-8 (discussing the time for persons to comply with the relevant PSD conditions and requirements).

Courts, including the lower courts in this matter, nonetheless construe section 304(f)(3) to allow suit only after a PSD permit has been issued. *See, e.g.*, Appx. Exhibit A, pp. 14a-15a ("the phrase 'of a permit' [does] nothing more than broaden[] the definition of 'emission standard or limitation' to include those conditions and requirements *found* in any permit *issued* pursuant to . . ." part C of subchapter I of the CAA.) (emphasis added). *Cf. Weiler*, 392 F.3d at 538; *Sugarloaf*, 1994 WL 447442 at *8 n.9. This construction is incorrect, because it violates rules of grammar and otherwise cannot be reconciled with the structure of the CAA.

i. Rules of grammar support CleanCOALition's construction of CAA section 304(f)(3)

The language in section 304(f)(3) is susceptible to only one literal, and logical, interpretation under rules of grammar. As a starting point, it is necessary to consider the technical structure of the language in section 304(f)(3), which can be diagramed as follows: any condition or requirement / of a permit / under part C / of subchapter I / of the CAA. The first portion of this language, i.e., "any condition or requirement," represents the subject of section 304(f)(3), which is

followed by four consecutive prepositional phrases: (1) "of a permit," (2) "under part C," (3) "of subchapter I," (4) "of [the CAA] . . . ."[15]

To construe section 304(f)(3) properly, it is necessary to identify the prepositions and corresponding prepositional "objects" that constitute the prepositional phrases in the section. The first prepositional phrase includes the preposition "of" followed by the object of that preposition, "a permit." The second phrase includes the preposition "under" followed by the object of that preposition, "part C." The third phrase includes the preposition "of" followed by the object of that preposition, "subchapter I," and the fourth phrase includes the preposition "of" followed by the object of that preposition, "[the CAA]."

The meaning of section 304(f)(3) depends upon what these prepositional phrases are intended to "modify" in the language of the section. Rules of grammar allow two possibilities: "When two or more prepositional phrases follow each other, they may modify the [subject of a sentence], or one phrase may modify the object in the preceding phrase." *See* Grammar Handbook: Prepositional Phrases, University of Illinois at Urbana–Champaign, the Writers Workshop, the Center for

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[15] This successive use of prepositional phrases likely has contributed to courts' incorrect construction of section 304(f)(3): "Two prepositional phrases in a row turn on the warning light, three make a problem, and four invite disaster." *See* BRYAN A. GARNER ET AL., The Redbook: A Manual on Legal Style 177 (Thompson/West 2d ed. 2006) (quoting the expert on prose Richard A. Lanham). Close study therefore is necessary (*see* below) to ascertain the proper meaning of section 304(f)(3).

Writing Studies, *http://www.english.uiuc.edu/cws/wworkshop/writer_resources/grammar_handbook/prepositional_phrases.htm*. The issue therefore is whether the four, successive prepositional phrases in section 304(f)(3) modify the subject of section 304(f)(3), i.e., "any condition or requirement," or whether the phrases modify the respective objects in preceding prepositional phrases. There are examples of both in section 304(f)(3).

Considering the prepositional phrases in reverse order, the fourth and third prepositional phrases modify the objects in the preceding prepositional phrases. For instance, the fourth prepositional phrase, "of the [CAA]," modifies the preceding object, "subchapter I," and the third prepositional phrase, "of subchapter I," modifies the preceding object, "part C."

By contrast, a logical reading of section 304(f)(3) dictates that the second and first prepositional phrases both modify the subject "any condition or requirement." For instance, (again considering the prepositional phrases in reverse order) the second prepositional phrase, "under part C," modifies the subject, "condition or requirement," and the first prepositional phrase, "of a permit," also modifies the subject, "condition or requirement."

This is the only logical construction of the first and second prepositional phrases, because the alternative construction (which TXU and courts implicitly have advanced) is that the second prepositional phrase, "under part C," modifies the object in the first prepositional phrase, "a permit." Under this

construction, section 304(f)(3) would be read as if its emphasis is on: "a permit under part C." To the contrary, the section is logical only if it is read with emphasis on "any condition or requirement . . . under part C" (albeit, a condition or requirement that must relate to a permit).[16]

The inescapable flaw with the construction of section 304(f)(3) that emphasizes, "a permit under part C," is that there is no *literal* way for "a permit" to be "under part C." *Cf. Flora v. United States*, 357 U.S. 63, 65 (1958) ("In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the *literal meaning* of words employed.") (emphasis added). By way of illustration, the phrase "a permit" reflects a noun form that refers to a tangible thing. When a tangible thing is discussed in reference to being "under" something, logic should dictate that the tangible thing physically is located in the position of "under." For instance, a shoe (i.e. a tangible thing) physically can be located "under" a table. It would be a non sequitur, however, to conclude a shoe could be located "under" some abstract concept. It likewise would be illogical to conclude "a permit" somehow could be "under" the abstract concept of a "part C." It simply strains logic to

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[16] This construction does not read "of a permit" out of the section. It treats this prepositional phrase as a qualifier intended to convey that part C of subchapter I of the CAA contains conditions and requirements of several variations. *See, e.g.*, 42 U.S.C. § 7471 (enumerating "requirements" under part C of subchapter I related to a state's SIP). However, only the conditions and requirements in part C of subchapter I related to permits are incorporated under section 304(f)(3).

conclude a tangible thing can have a proximity of being under something that only exists as an abstract concept.

The temptation may be to remedy this logical aberration by reading section 304(f)(3) as if it means "a permit *issued* under part C"; however, this would be improper, because Congress did not include the term "issued" in section 304(f)(3). *Cf. 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) ("But our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain-*neither to add* nor to subtract, neither to delete nor to distort.") (emphasis added).

Indeed, in a separate provision of CAA section 304, Congress used the phrase "permit *required* under part C of subchapter I" when it intended to convey that the relationship between the permit and part C is that the permit is issued under part C. *See* 42 U.S.C. § 7604(a)(3) (emphasis added). Congress used no such language in section 304(f)(3). Accordingly, it is improper to imply this meaning in the section. *See Allison Engine Co., Inc. v. United States*, 128 S. Ct. 2123, 2130 (2008) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotations omitted).

By contrast, in section 304(f)(3), the term "condition" and the term "requirement" both reflect noun forms that refer to conceptual, as opposed to tangible, things. There consequently is no strain on reason, nor need to

insert terms, when stating these conceptual things can exist "under" another conceptual thing; here, "part C" of the CAA. It consequently was logical for Congress to refer to a "condition or requirement" "under part C," but it would not have been logical for Congress to have referred to a "permit" as being "under part C."

CAA section 304(f)(3) consequently should be interpreted as a directive for parties to consult the *permit* conditions and requirements found under part C of subchapter I to determine which conditions and requirements are emissions standards or limitations within the meaning of section 304(f)(3). This construction is logical, and it relies solely on the literal meaning of the words used in section 304(f)(3). By contrast, TXU and the courts' interpretation of section 304(f)(3) requires insertion of the term "issued" for the section to make literal sense.[17]

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[17] The Fifth Circuit suggested its construction of section 304(a)(1) and 304(f)(3) was supported by the CAA's legislative history. *See* Appx. Exhibit A, p. 15a, n.6 (quoting H. Conf. Rep. No. 564, at 173 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1502, 1554). Although the Fifth Circuit initially seemed to acknowledge the legislative history relates to language found in CAA section *304(a)(3)*, 42 U.S.C. § 7604(a)(3), it nonetheless referenced the history as part of its analysis of CleanCOALition's section 304(a)(1) claim. This was incorrect, because section 304(a)(3) authorizes suit "against any person . . . who is alleged to have violated . . . or to be in violation of any condition of [a] permit" "required under part C of subchapter I of [the CAA] (*relating to significant deterioration of air quality*) or part D of subchapter I of [the CAA] (*relating to nonattainment*) . . . ." 42 U.S.C. § 7604(a)(3) (emphasis added). The relevant legislative history relates to this language in section 304(a)(3), because the enforcement of "part C" and "part D" permits referenced in section 304(a)(3) is a direct reference to the "significant deterioration [and] non-attainment permit[s]" expressly referenced in the legislative history.

Contextual cues in the structure of the CAA further support CleanCOALition's construction of section 304(f)(3).

ii. The structure of the CAA supports CleanCOALition's construction of CAA section 304(f)(3)

The structure of the CAA counsels against construing section 304(f)(3) to create a cause of action *only* for violation of conditions or requirements in *issued* PSD permits. *Cf. Jones v. United States*, 527 U.S. 373, 389 (1999) ("Statutory language must be read in context and a phrase gathers meaning from the words around it.") (internal quotations omitted). In CAA section 304(f)(4), and again under CAA section 304(a)(3), Congress created two independent causes of action for violations of conditions and requirements found in CAA permits. There consequently is no reason to conclude Congress intended section 304(f)(3) to be construed in a manner that conflicts with rules of grammar and logical, only to provide a third statutory basis for causes of action Congress otherwise had created.

Indeed, such a construction would make the causes of action in section 304(f)(4) and 304(a)(3) mere surplusage. *Cf. Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. . . . We are thus reluctan[t] to treat statutory terms as surplusage in any setting.") (internal citations and quotations omitted). By way of illustration, in CAA section 304(f)(4), Congress created a cause of action to redress permit violations, by defining an actionable violation to include violation of "any permit

term or *condition* . . . ." 42 U.S.C. § 7604(f)(4) (emphasis added). Under CAA section 304(a)(3), Congress created another cause of action to redress permit violations by authorizing suit "against any person . . . who is alleged to have violated . . . or to be in violation of any *condition* of [a] permit" "*required* under part C of subchapter I of [the CAA] . . . ." 42 U.S.C. § 7604(a)(3) (emphasis added).

Section 304(a)(3) particularly is significant given Congress expressly created a cause action against persons who violate conditions of a PSD permit required under part C of subchapter I of the CAA. There is no foreseeable basis why Congress would have done this through section 304(a)(3), if Congress also contemplated section 304(f)(3) would be construed (necessitating strained logic and improper grammar) to create an identical cause of action.

Section 304(f)(3) consequently should not be construed to create a cause of action only for violations that occur *after* a PSD permit has been issued. As CleanCOALition has contended, the literal, and logical, construction of the section is that it creates a cause of action when the conditions or requirements under part C of subchapter I (related to permits) are violated, and such violations can occur before a person obtains a PSD permit. *See supra* pp. 7-8.[18]

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[18] CAA section 165(a)(2), 42 U.S.C. § 7475(a)(2), provides another contextual cue that Congress wanted pre-permit conditions and requirements to be enforceable, because the actual heading of the section is "Preconstruction *requirements*." (emphasis added). The substance of the section makes clear the "requirements" arise during the pre-permit stage, because: (Cont'd)

The lower courts in this matter, and courts from other circuits, therefore have misconstrued CAA section 304(f)(3), nullifying private citizens' ability to bring section 304(a)(1) claims. This undermines the objectives and effective enforcement of the CAA, because an entity can proceed with the permitting and construction process, *see supra* pp. 9-11, even when it is clear the entity is violating the CAA. Under *Weiler* and *Sugarloaf*, the entity even can complete the facility and begin operations. At that stage, the PSD mandates governing how power plants must be constructed, at best could serve as bases for civil penalties, but forever lost is the opportunity actually to enforce PSD mandates as Congress intended.

b. The standards and limitations in Texas's SIP constitute actionable emissions standards or limitations

CAA section 304(f)(4) also is a basis for a cause of action to redress pre-permit violations. The section defines "emission standard or limitation under [the CAA]" to include: "any other standard, limitation, or schedule established . . . under any applicable State implementation plan [SIP] . . . ." 42 U.S.C. § 7604(f)(4).

(Cont'd)

"No major emitting facility . . . may be constructed . . . unless . . . the *proposed* permit has been subject to a review in accordance with . . ." section 165(a)(2). (emphasis added). Because a PSD permit applicant has the duty to present the information and environmental analyses mandated by 165(a)(2), the required "review" cannot occur if the applicant fails to fulfill these obligations. *See Niagara Mowhawk Power Corp.*, 263 F. Supp. 2d at 663.

Texas's SIP incorporates pre-permit standards and limitations that are equivalent to the:

1. "cause and contribute,"[19]

2. "best available control technology,"[20] and

3. "air quality impacts" requirements.[21]

Indeed, the SIP specifies that "[i]n order to be granted a permit to construct, the owner or operator of the proposed facility shall *submit* information . . . which *will demonstrate* . . . ." the foregoing pre-permit standards and limitations.[22] TXU has not satisfied these requirements, because it never has undertaken the environmental and technical analyses that correspond with the requirements. TXU consequently is violating pre-permit standards and limitations in the Texas SIP, and these violations are actionable under section 304(a)(1). The lower courts in this matter, as well as other courts, nevertheless have concluded section 304(a)(1) cannot support a citizen suit based on violations of pre-permit standards and limitations in a SIP. *See, e.g.*, Appx. Exhibit A, p. 19a. This too undermines the

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[19] *See generally* 40 C.F.R. § 51.166(k); 1976 *Texas State Implementation Plan* § XIV (Rules & Regulations) at Rule 603.13, found at *http://www.tceq.state.tx.us*/assets/public/implementation/air/sip/sipdocs/1976-SIP/1976_sip_section_xiv.pdf.

[20] *See generally id.* at Rule 603.16.

[21] *See generally id.* at Rule 603.12.

[22] *See generally id.* at Rule 603.1 (emphasis added).

objectives and effective enforcement of the CAA, because it allows a CAA violator to proceed with the permitting, construction, and even completion of a CAA facility even when it is clear it is violating the CAA.

2. The matters at issue in this lawsuit can be resolved and the public interest will be served if the Court resolves the proper operation of CAA section 304(a)(1)

Courts essentially have construed the provisions of sections 304(a)(1) and 304(f) based on a lay interpretation of "emission standard" and "emission limitation." For instance, the courts have concluded a standard or limitation cannot be violated before a CAA facility is completed and operational. *See Weiler*, 392 F.3d at 538; *Sugarloaf*, 1994 WL 447442 at *8 n.9. This overly narrow construction of "emission standard or limitation" ignores the express language of CAA section 304(f), which defines the phrase to include a broad range of activities that occur, or obligations that arise, before a PSD permit has been issued and before a CAA facility is constructed, becomes operational, or begins emitting pollutants. For instance, the "best available control technology" analysis, and ultimate determination, must be preformed pre-permit and by definition is an "emission limitation." *See* 42 U.S.C. § 7479(3).

Courts, including the lower courts in this matter, nevertheless have struggled with the prospect of pre-permit violations, because the courts were troubled that violations could arise based on information, or lack thereof, in an application to obtain a PSD permit.

See, e.g., Appx. Exhibit A, p. 19a.[23] This, however, is the nature of the CAA permitting process, because persons are obligated to undertake certain CAA conditions and requirements before they seek (by way of application) a PSD permit. *See supra* pp. 7-8; 263 F. Supp. 2d at 663.[24]

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[23] For instance, the Fifth Circuit held *Niagara Mohawk* and related cases stand for the proposition that actionable violations of PSD requirements do not occur until a facility is constructed. *See* Appx. Exhibit A, p. 20a. The Fifth Circuit misperceives the holdings from *Niagara Mohawk* and the related cases. The courts in the respective cases did not resolve whether or when a CAA citizen suit can be brought based on pre-permit violations. The courts consequently did not suggest claims such as CleanCOALition's are impermissible. They instead were attempting to resolve whether violations of PSD requirements could be treated as continuing violations that toll a five-year statute of limitations for citizen suits. In this narrow context, they held a violation of the PSD obligations will not operate as an actionable CAA violation in perpetuity, but instead "accrues" when a CAA facility is constructed. The courts therefore concluded the statute of limitations was not tolled, and suit must be initiated within five years from the date of construction. This holding offers no insight into the matters presently at issue.

[24] A similar citizen suit provision under subchapter V of the CAA (which governs "operating" permits) also authorizes a suit to challenge a "proposed" permit. *See* 42 U.S.C. § 7661d(b)(2) (authorizing private citizens to petition the EPA Administrator to object to operating permits, *even if not yet issued*, and allowing citizens to file a citizen suit if the Administrator fails to object to a proposed permit). Congress therefore displayed no reservations about authorizing citizens to sue to remedy CAA violations that occur *before* a permit (PSD or operating) is issued. *But see Freeman v. Cincinnati Gas & Elec. Co.*, No. 1:05CV179, 2005 WL 2837466, at *2 (S.D. Ohio Oct. 27, 2005) (construed to mean no cause of action exists to challenge a *proposed* operating permit, although the express language of 42 U.S.C. § 7661d(b)(2) authorizes just such a cause of action).

In any event, CAA section 304(b)(1)(A) requires a potential CAA plaintiff to provide sixty-days notice of CAA violations before filing a citizen suit. *See* 42 U.S.C. § 7604(b)(1)(A). CleanCOALition did so here, and the sixty days expired without TXU curing its CAA violations. CleanCOALition consequently was authorized to move forward with its suit not merely because TXU's PSD permit application was defective, but because TXU disregarded CleanCOALition's notice and did not cure its violations of the relevant PSD obligations.

Accordingly, the nexus between the structural and practical operation of the CAA supports section 304(a)(1) claims based on pre-permit violations. Proper regard for the operation of section 304(a)(1) therefore dictates a person states a claim if he alleges violations of pre-permit conditions or requirements under part C of subchapter I or pre-permit standards or limitations in a SIP. Here, regardless of the ultimate outcome, CleanCOALition consequently has stated a legitimate cause of action against TXU.

Nonetheless, under current precedents, no such cause of action exists, even when it is clear a person has engaged in CAA violations at the pre-permit stage. This construction of section 304(a)(1) undermines effective enforcement of the CAA and jeopardizes Congress's objectives under the Act. CleanCOALition therefore respectfully requests that the Court grant this Petition for Writ of Certiorari to resolve the proper operation of CAA section 304(a)(1).

C. The Matters in this Lawsuit Can Be Resolved and the Public Interest Will Be Served if the Court Resolves whether CAA Section 304(a)(3) Operates to Prevent Construction of Plants Based on Defective PSD Permits

CAA section 304(a)(3) authorizes suit "against any person who proposes to construct or constructs . . . [a CAA] facility without a permit required under part C of subchapter I of [the CAA]. . . ." 42 U.S.C. § 7604(a)(3). CleanCOALition sued TXU under CAA section 304(a)(3), because TXU "proposes to construct" its power plant based on a defective PSD permit.

A fair reading of section 304(a)(3) is that it authorizes such suits. TXU nonetheless has contended section 304(a)(3) provides a cause of action only when an entity intends to construct a facility *with no permit at all.*[25] The lower courts, as well as other courts, have adopted this construction. *See, e.g.*, Appx. Exhibit A, pp. 22a-23a.

No legitimate interest would be served, indeed it would be counter-productive to the objectives of the CAA, if entities could propose to construct CAA facilities simply because they seek a PSD permit, no matter that the permit will be defective. Had Congress intended this, it would not have conditioned a section 304(a)(3) cause of action on the language: "permit required under part C of subchapter I . . . ." *See* 42 U.S.C. § 7604(a)(3). As discussed above, part C of subchapter I imposes conditions and requirements, on applicants, that are

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[25] ROA, p. 74; Hearing Transcript, pp. 4, 15, 17.

prerequisites to issuance of valid permits. Accordingly, a permit never can be "a permit required under part C of subchapter I" if an applicant has not satisfied the pre-permit conditions and requirements mandated therein. The CAA's legislative history appears to provide some support for this proposition.

Section 304(a)(3) was added to the CAA in 1977. The Senate summarized the new cause of action by explaining: "Section 304 of the Clean Air Act is amended to allow a citizen to bring suit to prevent construction of a major emitting facility without a permit *in compliance with . . . CAA § 165*[] . . . ." H. Conf. Rep. No. 564, at 173 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1502, 1553 (emphasis added).[26]

The plain language of section 304(a)(3), and related legislative history, therefore reflects Congress did not intend section 304(a)(3) to embrace only claims against entities that propose to construct a facility without *any* PSD permit. Section 304(a)(3) instead is a basis for claims against entities that propose to construct a CAA facility without a permit that actually complies with the CAA.

This is precisely the section 304(a)(3) cause of action CleanCOALition pleaded against TXU, because TXU never has completed the PSD prerequisites found under, *inter alia*, CAA section 165(a)(3),(4), & (6),

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[26] This clarifying language was not included in a subsequent House Conference Report, though the legislative record does not contain an explanation for the exclusion.

42 U.S.C. § 7475(a)(3),(4), & (6). TXU's PSD permit consequently is inherently defective and cannot be characterized as "a permit required under part C of subchapter I [of the CAA]."

Courts that have held no cause of action exists under these circumstances are usurping a critical CAA enforcement mechanism, because under the current state of the law, a person can propose and even begin preliminary construction of a CAA facility, *see* 2008 WL 2705570 at **2-3, even when the person seeks a PSD permit that will not comply with part C of subchapter I. This effectively denies citizens the ability to seek enforcement of the CAA at a time when enforcement actually could "protect and enhance the quality of the Nation's air resources . . . ." 42 U.S.C. § 7401(b)(1). CleanCOALition therefore respectfully requests that the Court grant this Petition for Writ of Certiorari to resolve the proper operation of CAA section 304(a)(3).

D. The Matters in this Lawsuit Can Be Resolved and the Public Interest Will Be Served if the Court Resolves whether the *Burford* Abstention Doctrine Is Inapplicable to CAA Citizen Suits

Congress authorized private citizens to sue in federal court to remedy CAA violations. 42 U.S.C. § 7604(a) ("district courts *shall have jurisdiction* . . . ." over CAA suits) (emphasis added). Application of *Burford* abstention to CAA citizen suits therefore subverts the central purpose of CAA section 304(a), i.e., creation of a *federal* cause of action to redress CAA violations.

There nonetheless is considerable discord between courts regarding whether *Burford* abstention is a valid basis for forgoing jurisdiction over CAA citizen suits. Whereas some courts have concluded abstention cannot be reconciled with the federal right of action granted in the CAA and similar statutes,[27] other courts (including the district court in this matter) have concluded abstention is appropriate.[28] Neither the history of the *Burford* abstention doctrine, nor the language or structure of the CAA permits abstention in CAA citizen suits.

1. Historical basis for the *Burford* abstention doctrine

The *Burford* abstention doctrine arose in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). There, a plaintiff sued in federal court claiming the Texas Railroad Commission (the "Commission") violated the Fourteenth Amendment by granting a disputed drilling permit. *Id.* at 317. Texas had a centralized system for judicial

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[27] *See, e.g., Or. State Pub. Interest Research Group v. Pac. Coast Seafood Co.*, 341 F. Supp. 2d 1170, 1177-78 (D. Or. 2004); *L.E.A.D. v. Exide Corp.*, No. Civ. 96-3030, 1999 WL 124473, *22 (E.D. Pa. February 19, 1999); *Culbertson v. Coats Am., Inc.*, 913 F. Supp. 1572, 1578 (N.D. Ga. 1995); *Student Pub. Interest Research Group of New Jersey, Inc. v. P.D. Oil & Chem. Storage, Inc.*, 627 F. Supp. 1074, 1085 (D.N.J. 1986); *Brewer v. City of Bristol*, 577 F. Supp. 519, 524 (E.D. Tenn. 1983) (rejecting abstention doctrines for Clean Water Act and CAA citizen suits).

[28] *See* Appx. Exhibit B, p. 51a; *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 480 (6th Cir. 2004) (applying *Burford* in CAA citizen suit).

review of Commission orders, which allowed the state judiciary to develop extensive expertise on the relevant subject matter. 319 U.S. at 327. This Court consequently concluded efficiencies justified relinquishment of jurisdiction to the comparatively sophisticated Texas state courts. *Id.* at 334.

The *Burford* plaintiff's claim was not premised, however, on an express grant of congressional authority to sue in federal court. This differs materially from claims under CAA section 304(a), which are in fact premised on an express grant of authority to proceed in federal court. The narrow factual and procedural context of *Burford v. Sun Oil Co.* is critical to a understanding of the proper scope of the *Burford* abstention doctrine.

2. *Burford* abstention should not be extended to CAA citizen suits

The generic applicability of the *Burford* abstention doctrine cannot justify disregarding Congress's mandate that federal courts are the proper forum for section 304(a) citizen suits, because courts "are not at liberty to create an exception where Congress has declined to do so." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 874 (1991) (internal quotations omitted). Moreover, "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris County*, 529 U.S. 576, 583 (2000).

The CAA consequently should be construed from the perspective that if Congress wanted state courts or agencies to have exclusive, or even concurrent,

jurisdiction over CAA citizen suits, Congress would have said so.[29] Likewise, if Congress wanted federal courts to abstain from exercising jurisdiction over citizen suits otherwise vested with the courts, Congress again would have said so. It did neither.

Indeed, Congress articulated none of the considerations underlying *Burford* abstention as limitations on private citizens' right to bring CAA citizen suits in federal court. By contrast, in other CAA provisions, Congress clearly signaled its awareness of the states' role in implementing other aspects of the CAA and expressly articulated those circumstances under which it wanted state involvement.

For instance, Congress expressly articulated the requirement that a private citizen must provide sixty-days notice to a CAA violator before suit, as well as pre-suit notice to the EPA *and* states in which violations occur. *See* 42 U.S.C. § 7604(b)(1); *see also* 40 C.F.R. § 54.2. The purpose of this pre-suit notice provision is to afford the EPA or states an opportunity to intervene to enforce the CAA before private citizens sue to enforce the Act.

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[29] The language and contextual cues in the CAA (discussed herein) justify application of the exceptions to the principle that courts generally "begin, in every case, with the presumption that state courts enjoy concurrent jurisdiction over [federal] claims. . . . . Only an explicit statutory directive, [an] unmistakable implication from legislative history, or . . . a clear incompatibility between state-court jurisdiction and federal interests will rebut the presumption." *Hathorn v. Lovorn*, 457 U.S. 255, 266 (1982) (internal citations and quotations omitted).

Also, in 42 U.S.C. § 7410(a), Congress expressly directed each state to establish a SIP governing certain *administrative* components of the CAA. Congress did not designate, however, state courts as the *judicial* forums for citizen suits.

The judiciary consequently should not interject, by fiat, abstention principles to accomplish a result Congress did not intend. This would rewrite the well-crafted provisions of the CAA, and contravene private citizens' congressionally granted right to bring citizen suits, in federal court, to redress CAA violations.

3. Federal courts have exclusive jurisdiction over CAA citizen suits

In any event, Congress intended federal courts to have exclusive jurisdiction over CAA suits. When the provisions of the CAA are read in context, this is the only logical construction of section 304(a).

a. In the CAA, Congress used the phrase "district courts" regarding only federal courts

In the CAA's judicial enforcement provisions, Congress used some variation of the phrase "district court" in contexts that mean *only* federal district courts. For instance, in CAA section 113(b), 42 U.S.C. § 7413(b), Congress authorized the EPA Administrator to bring a civil suit against any person violating CAA requirements incorporated into SIPs. Congress specified any "action under this subsection may be brought in the *district court* of the *United States*. . . ." 42 U.S.C. § 7413(b) (emphasis added).

In CAA section 204(a), 42 U.S.C. § 7523(a), Congress authorized the federal government to bring a civil action to enjoin violations of vehicle emissions requirements. Congress again specified that the "*district courts* of the *United States* shall have jurisdiction . . . ." 42 U.S.C. § 7523(a) (emphasis added). *See also* 42 U.S.C. § 7524(b); 42 U.S.C. § 7603. In CAA section 304(a), Congress created the federal citizen suits and used the truncated phrase "district courts" to specify the federal district courts "shall have jurisdiction" over such suits.

There is no reason to assume Congress intended the phrase "district courts" to have different meanings in the various provisions of the CAA. The "interrelationship and close proximity of these provisions . . . presents a classic case for application of the normal rule of construction that identical words used in different parts of the same act are intended to have the same meaning." *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996) (internal quotations omitted).

Otherwise, Congress would have used the phrase "district courts" in section 304(a) in a manner contrary to how Congress used "district courts" in the other judicial enforcement provisions. The logical construction is that Congress intended the phrase "district court(s)" to have a consistent meaning throughout the CAA, i.e., federal district courts. Additional contextual language in the CAA compels this conclusion.

b. Contextual language necessitates construction of "district courts" to mean federal district courts

If "district courts" in section 304(a) is not construed to mean (only) federal district courts, the section would be illogical, because not all states have judicial tribunals referred to as "district courts." Arizona, California, Connecticut, Delaware, and Indiana have "superior" courts.[30] Georgia, Illinois, Michigan, Mississippi, Missouri, Oregon, South Carolina, South Dakota, Tennessee, West Virginia, and Wisconsin have "circuit" courts. Louisiana has "Parish" courts. New York has "Supreme Courts." Ohio has the "court of common pleas," and Pennsylvania has "commonwealth" courts.

It would be illogical to construe section 304(a) in a manner that ignores almost half the states do not have anything called "district courts" to correspond with the express language of section 304(a). Interpretations "of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Here, absurdity is avoided, and the express legislative purpose served, if "district courts" is construed to mean federal district courts, because the trial courts in the federal system are known as "district courts."

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[30] The District of Columbia also has "superior courts."

Indeed, Congress demonstrated its ability to invoke references to state judicial systems when, in fact, that was Congress's intent. In CAA section 502(b)(6), 42 U.S.C. § 7661a(b)(6), Congress directed the EPA Administrator to develop regulations requiring each state to develop an "operating permit" program (which is distinct from the PSD permit program), that included: "Adequate, streamlined, and reasonable procedures for . . . expeditious review of permit actions . . . and including an *opportunity for judicial review in State court* of the final permit action . . . ." (emphasis added). The EPA Administrator therefore promulgated 40 C.F.R. § 70.4(b)(3)(x). Congress could have, but did not, make any similar provision for state court review of violations related to PSD construction permits. Courts, consequently, should not read this into the CAA.

In CAA section 304(b)(1)(B), Congress indicated a section 304(a)(1) citizen suit is preempted if the United States or state government first initiates a CAA enforcement action. To specify these government actions could be brought in federal *or* state court, Congress did not use the phrase "district courts." Congress instead used language that actually articulates the right to proceed in either judicial system: "No action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States *or* a State . . . ." 42 U.S.C. § 7604(b)(1)(B) (emphasis added).[31]

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[31] Other statutory enactments illustrate Congress appreciates the distinction between federal and state courts and knows how to articulate the distinction effectively. A citizen suit provision in the Federal Fair Housing Act provides: "An aggrieved person may commence a civil action in an appropriate United States district court *or* State court . . . ." 42 U.S.C. § 3613(a)(1)(A) (emphasis added).

Similarly, in CAA section 304(e), Congress clarified that nothing about Congress's creation of federal rights and remedies in the citizen suit provisions prohibited state governments from bringing suit in *state court*, under *state law*, to redress air pollution:

> Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—
>
> [] bringing any enforcement action or obtaining any judicial remedy or sanction in any *State or local court* . . . . . under *State or local law* respecting control and abatement of air pollution.

42 U.S.C. § 7604(e) (emphasis added).

The foregoing provisions demonstrate Congress: (1) appreciated the difference between the state and federal systems; (2) knew how to refer to the separate state system when Congress, in fact, intended to do so; and (3) appreciated that after creating an exclusively federal regime for private citizen suits, it was necessary to clarify the limited circumstances when litigation was appropriate in state courts.

The CAA provides one additional, though significant, contextual indication that Congress intended citizen suits to be litigated in federal courts. In section 304(d), Congress enacted a provision that governs the procedure courts must follow when imposing bond or security requirements as conditions of injunctive relief

under the CAA. This provision specifies a court must follow the Federal Rules of Civil Procedure. *See* 42 U.S.C. § 7604(d).

It would be odd, and apparently a first, for Congress to mandate use of the Federal Rules of Civil Procedure, if Congress envisioned state court jurisdiction over citizen suits. Simply put, Congress would be forcing state courts to use federal procedure. This oddity is avoided if section 304 is construed from the perspective that Congress intended exclusive federal jurisdiction over CAA citizen suits.

A contextual reading of section 304 therefore compels the conclusion federal courts have exclusive jurisdiction over citizen suits. Courts, including the district court in this matter, that have held *Burford* abstention is permissible in a CAA citizen suit therefore undermine Congress's intended operation of the CAA. CleanCOALition therefore respectfully requests that the Court grant this Petition for Writ of Certiorari to resolve whether *Burford* abstention is in fact inappropriate in CAA citizen suits.

CONCLUSION

The lower courts in this matter, as well as courts from other circuits, have subverted essential enforcement provisions in the CAA, thereby undermining Congress's objectives in the Act. Congress's express creation of a federal mechanism for judicial enforcement of the CAA further has been undermined by application of the *Burford* abstention doctrine. Petitioners CleanCOALition and Robertson County: Our Land, Our Lives consequently have had their rights under the CAA abrogated, and Congress's intended operation of the CAA has been put in jeopardy as a general matter. Petitioners therefore respectfully request that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JULY 21, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-50685

CLEANCOALITION; ROBERTSON COUNTY: OUR LAND OUR LIVES

Plaintiffs-Appellants

v.

TXU POWER, doing business as TXU GENERATION COMPANY LP; OAK GROVE MANAGEMENT COMPANY LLC; TXU CORPORATION

Defendants-Appellees

Appeal from the United States District Court for the Western District of Texas

Before REAVLEY, SMITH, and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

This case of first impression involves the scope of citizen-suit jurisdiction under the Clean Air Act ("CAA"). *See* 42 U.S.C. § 7604(a). Plaintiffs-Appellants filed suit to enjoin Defendants-Appellees from constructing a

pulverized coal-fired power plant in their community, alleging various violations of the CAA preconstruction permit process. The district court dismissed this case on the ground that, *inter alia*, neither of the asserted bases for subject matter jurisdiction, §§ 7604(a)(1) and 7604(a)(3), provides for jurisdiction in this case. For the reasons stated herein, we agree and, therefore, affirm the judgment of the district court.

I. BACKGROUND FACTS

CleanCOALition and Robertson County: Our Land, Our Lives (collectively "Appellants") are environmental interest groups whose members are concerned with environmental health issues, including air quality. TXU Power, Oak Grove Management LLC, and TXU Corporation (collectively "TXU") are utility entities that have proposed the construction of a pulverized coal-fired power plant in Robertson County, Texas. Members of Appellants reside in Robertson County and allege they will be adversely affected by emissions from the plant.

On July 27, 2005, TXU applied for a preconstruction permit with the Texas Commission on Environmental Quality ("TCEQ"), which regulates the preconstruction authorization process for the State of Texas under the CAA's Prevention of Significant Deterioration ("PSD") Program. *See* 42 U.S.C. § 7401, *et seq.* On February 21, 2006, the TCEQ completed a technical review of TXU's application and issued a preliminary decision and draft permit. TXU requested the TCEQ to refer the application to the State Administrative Office of

Hearings ("SOAH") for a hearing to determine whether it complied with all relevant statutory and regulatory requirements. One of the Appellants participated in this hearing. On August 23, 2006, the SOAH issued a Proposal for Decision approving the permit, subject to final review by the TCEQ.

On December 1, 2006, after expiration of a 60-day written notice,[1] Appellants filed suit against TXU alleging that its permit application does not comply with requirements of the PSD Program. Specifically, Appellants allege that (1) TXU is violating preconstruction emissions standards and limitations mandated by the CAA; and (2) TXU intends to construct its proposed plant without a CAA-compliant permit. Appellants seek, *inter alia*, (1) declaratory relief that TXU is in violation of the CAA; (2) temporary and permanent injunctive relief prohibiting the construction of the plant; and (3) an order that TXU comply with the preconstruction requirements of the PSD Program. They also seek an assessment of civil penalties against TXU in the amount of $27,500.00 per day for each violation.

On December 21, 2006, TXU filed a motion to dismiss based on jurisdictional, justiciability, and abstention grounds. On May 21, 2007, the district court granted the

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1. Prior to filing certain citizen suits, the CAA requires that aggrieved parties give 60 days notice of the standard, limitation, or order alleged to be violated to (1) the EPA, (2) the state in which the alleged violation occurred, and (3) the alleged violator. *See* 42 U.S.C. § 7604(b). Here, Appellants sent the requisite notice.

motion to dismiss. Specifically, the district court held that (1) Section 7604(a)(1) does not authorize citizen suits to redress alleged pre-permit, preconstruction, pre-operation CAA violations; (2) Section 7604(a)(3) of the CAA does not authorize preconstruction citizen suits against entities that either have obtained a permit or are in the process of doing so; (3) Appellants failed to present a live case or controversy because the state permit process is still ongoing; and (4) even if it had subject matter jurisdiction, the district court would abstain from exercising it pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) because timely and adequate state court review was available and the exercise of federal review would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern. Appellants filed a timely notice of appeal.[2]

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2. Subsequent to the filing of this appeal, on June 13, 2007, the TCEQ voted to grant the permit and on June 20, 2007, issued an order to that effect. On August 8, 2007, the TCEQ overruled a motion for rehearing. Separate entities—other than the parties in this case—have since filed suit in state court challenging the issuance of the permit. TXU has filed an unopposed motion for this court to take judicial notice of these facts. A court may take judicial notice of a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). "An appellate court may take judicial notice of facts, even if such facts were not noticed by the trial court." *United States v. Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir.2001) (citing Fed.R.Evid. 201(f)). We agree that these facts are the kind of which this court could take judicial notice, though they do not alter our disposition in this case.

Appendix A

II. STATUTORY AND REGULATORY FRAMEWORK

Congress enacted the 1970 Amendments to the CAA to establish "a comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution." *GM Corp. v. United States*, 496 U.S. 530, 532, 110 S.Ct. 2528, 110 L.Ed.2d 480 (1990). The 1970 Amendments indicate, however, that although "[f]ederal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution," *see* 42 U.S.C. § 7401(a)(4), "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." *See* 42 U.S.C. § 7401(a)(3). Thus, while the Amendments assign the Environmental Protection Agency ("EPA") the responsibility for "prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard" for certain pollutants, *see* 42 U.S.C. § 7409(1)(A), they assign the States the primary responsibility for "assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards ['NAAQS'] will be achieved and maintained within each air quality control region in such State." *See* 42 U.S.C. § 7407(a); *see also* 42 U.S.C. § 7410(a)(1) ("Each State shall . . .

adopt . . . a plan which provides for implementation, maintenance, and enforcement of such primary . . . [and] secondary standard in each air quality control region (or portion thereof) within such State."). They further mandate that each State implementation plan ("SIP") include a permit program. *See* 42 U.S.C. § 7410(a)(2)(C). In Texas, the TCEQ administers the State CAA permit program.[3]

In 1977, further amendments were made to the CAA in which Congress enacted the PSD Program, *see* 42 U.S.C. §§ 7470-7492, because the then-existing EPA New Source Performance Standards did too little to "achiev[e] the ambitious goals of the 1970 Amendments." *Envtl. Def. v. Duke Energy Corp.*, 127 S.Ct. 1423, 1429 (2007) (citation omitted). Thus, the 1977 Amendments "[gave] added protection to air quality in certain parts of the country 'notwithstanding attainment and maintenance of' the NAAQS." *Id.* at 1427 (quoting

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3. Although, the EPA is required to approve SIPs that provide for the timely attainment and subsequent maintenance of primary and secondary ambient air standards as well as satisfy other CAA general requirements, *see* 42 U.S.C. § 7410(a)(3), the EPA has no authority to question the wisdom of a State's choices of emission limitations if they are part of a SIP that otherwise satisfies the standards set forth in 42 U.S.C. § 7410(a)(2). "Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. NRDC*, 421 U.S. 60, 79, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975); *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 268-69, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976).

42 U.S.C. § 7470(1)). They also "assure[d] that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process." 42 U.S.C. § 7470(5). To ensure CAA compliance, Congress mandated the issuance of PSD permits before construction of any "major emitting facility." *See* 42 U.S.C. § 7475(a)(1).

Under the 1977 Amendments—similar to the 1970 Amendments—"[s]tates have the primary role in administering and enforcing the various components of the PSD program." *ADEC v. EPA*, 540 U.S. 461, 491 (2004) (quoting 57 Fed.Reg. 28,095 (1992)). However, Congress has set forth explicit substantive and procedural requirements that must be met prior to the construction of any major emitting facility. The substantive requirements include, *inter alia*, a demonstration that: (1) "emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any" applicable emission standards; (2) "the proposed facility is subject to the best available control technology for each pollutant;" (3) the facility complies with any applicable Class I area protection requirements; (4) "there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;" and (5) "the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit

is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source." *See* 42 U.S.C. §§ 7475(a)(3)-(7), 7475(d). The procedural requirements include, *inter alia*, a public hearing and an opportunity for any interested person to appear and submit comments on a proposed permit. *See* 42 U.S.C. § 7475(a)(2). The EPA further "interprets existing law and regulations to require an opportunity for state judicial review of PSD permit actions under approved PSD SIPs by permit applicants and affected members of the public in order to ensure an adequate and meaningful opportunity for public review and comment on all issues within the scope of the permitting decision, including environmental justice concerns and alternatives to the proposed source." Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia—Prevention of Significant Deterioration Program, 61 Fed.Reg. 1880 (Jan. 24, 1996) (to be codified at 40 C.F.R. pt. 52) (The EPA).

The State of Texas has an EPA-approved PSD Program. *See* Approval and Promulgation of Implementation Plans; Texas; Revisions to Regulations for Control of Air Pollution by Permits for New Sources and Modifications, 67 Fed.Reg. 58,697 (Sept. 18, 2002) (to be codified at 40 C.F.R. pt. 52). Pursuant to this Program, "[b]efore work is begun on the construction of a new facility or a modification of an existing facility that may emit air contaminants, the person planning

the construction or modification must obtain a permit or permit amendment from the commission." Tex. Health & Safety Code § 382.0518(a). The general requirements for a permit are set forth in Title 30 of the Texas Administrative Code, Sections 116.111 and 116.160-63. In reviewing a PSD permit application, Texas law provides an opportunity for public comment. *See* 30 Tex. Admin. Code § 55.150, *et seq.* Texas law also permits any person granted party status to request and participate in contested hearings before the SOAH. *See* 30 Tex. Admin. Code § 55.200, *et seq.* Finally, Texas law allows for state judicial review over any permit decision. *See* Tex. Gov't Code § 2001.001, *et seq.*

III. ANALYSIS

The district court dismissed CleanCOALition's complaint in this case for lack of subject matter jurisdiction, a decision of a legal question we review *de novo*. *Meredith v. La. Fed'n of Teachers*, 209 F.3d 398, 402 (5th Cir.2000). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir.1998) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir.1996)).

The jurisdictional question in this case involves construction of the CAA's citizen-suit provisions. "[T]he starting point in every case involving construction of a statute is the language itself." *Greyhound Corp. v. Mt.*

Hood Stages, Inc., 437 U.S. 322, 330, 98 S.Ct. 2370, 57 L.Ed.2d 239 (1978); *see also Sutton v. United States*, 819 F.2d 1289, 1292 (5th Cir.1987) ("We begin, as we must, with an analysis of the text of the statute itself."). "If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Birdwell v. Skeen*, 983 F.2d 1332, 1339 (5th Cir.1993) ("Where the language of a statute is clear and unambiguous, courts should not undertake to add to or detract from its provisions."). "In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988)); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[A] statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context.").

We now turn to the statutory text in question. The CAA provides for federal citizen suit jurisdiction in three circumstances:

(1) Against any person . . . who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation;

(2) Against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator, or

(3) Against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of title I (relating to significant deterioration of air quality) or part D of title I (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

42 U.S.C. §§ 7604(a)(1)-(3).[4] Only the first and third provisions are at issue in this case. We address each provision in turn.

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4. These provisions "provide citizen participation in the enforcement of standards and regulations established under [the CAA]." *Natural Res. Def. Council v. Train*, 510 F.2d 692, 699 (D.C.Cir.1975) (citations omitted). They reflect Congress's recognition that "citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike." *Id.* at 699-700 (citations omitted).

A. Whether § 7604(a)(1) authorizes citizen suits to redress alleged pre-permit, preconstruction, pre-operation CAA violations?

The district court held that § 7604(a)(1) does not authorize citizen suits to redress alleged pre-permit, preconstruction, pre-operation CAA violations. According to the district court, when a facility is still in the pre-permit, preconstruction, pre-operation stage, it has yet to emit anything and cannot be deemed "to have violated . . . or be in violation of an emission standard or limitation." *See* 42 U.S.C. § 7604(a)(1); *see also Weiler v. Catham Forest Prods., Inc.*, 392 F.3d 532, 538 (2d Cir.2004) ("[A § 7604(a)(1)] suit can only be brought against a private defendant after a facility has been built and begun operation."); *Sugarloaf Citizens Ass'n v. Montgomery County*, No. 93-2475, 1994 WL 447442 at *8 n. 9 (4th Cir. Aug. 17, 1994) (unpublished) ("[U]ntil construction is completed . . . [Appellees] can neither begin emissions nor violate any emissions standard."). Appellants, citing §§ 7604(f)(3) and 7604(f)(4),[5] respond that the phrase "emission standard

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5. Section 7604(f) broadly defines an "emission standard or limitation under this Act" as follows:

> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard;
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> (2) a control or prohibition respecting a motor vehicle fuel or fuel additive;

(Cont'd)

or limitation" is defined broadly enough to encompass preconstruction requirements and thus, TXU can be deemed "to have violated . . . or be in violation of an emission standard or limitation" simply by filing a permit application without satisfying those requirements. We address §§ 7604(f)(3) and § 7604(f)(4) in turn.

(Cont'd)

> (3) any condition or requirement of a permit under part C of title I (relating to significant deterioration of air quality) [and other particular types of permits not applicable here], any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, [fuel, fuel additives, visibility protection, ozone protection, or stationary sources]; or
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> (4) any other standard, limitation, or schedule established under any permit issued pursuant to title V or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations;
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> which is in effect under this Act (including a requirement applicable by reason of section 118 or under an applicable implementation plan.)

42 U.S.C. § 7604(f).

1. **Whether the definition of "emission standard or limitation," as set forth in § 7604(f)(3), is broad enough to include requirements for filing preconstruction permit applications?**

Appellants first argue that because "emission standard or limitation" is defined to include "any condition or requirement of a permit under part C of title I (relating to significant deterioration of air quality)," *see* 42 U.S.C. § 7604(f)(3), which contains preconstruction requirements, TXU can be deemed "to have violated . . . or be in violation of an emission standard or limitation" simply by filing a permit application without satisfying those requirements. We disagree. One can hardly be deemed to have violated a "condition or requirement of a permit" simply by filing an incomplete permit *application*, in response to which a permit may or may not issue. *See Miss. River Revival, Inc. v. EPA*, 107 F.Supp.2d 1008, 1015 (D.Minn.2000) (construing Clean Water Act citizen suit provision, which was modeled after the CAA, and finding that it "does not authorize jurisdiction for an action challenging the contents of a permit application."); *Freeman v. Cincinnati Gas & Elec. Co.*, No. 1:05CV179, 2005 WL 2837466, at *2 (S.D.Ohio Oct. 27, 2005) (holding that a proposed Title V air permit cannot form the basis of a citizen suit). Nevertheless, Appellants invite us to interpret the phrase "any condition or requirement of a permit" to mean "any condition or requirement *to obtain* a permit." We decline to do so. Instead, we interpret the phrase "of a permit" as doing nothing more than broadening the definition of "emission standard or

limitation" to include those conditions and requirements found in any permit issued pursuant to any of the various provisions listed in § 7604(f)(3).[6] Until the permit issues, however, no "permit" exists to be violated. If Congress wanted to define "emission standard or limitation" to include any condition or requirement to obtain a preconstruction permit, it certainly knew how to do so. Indeed, the last clause of another section, § 7604(f)(4), specifically defines "emission standard or limitation" to include "any requirement to obtain a permit *as a condition to operations.*"[7] No similar counterpart exists for a *preconstruction* permit, which is at issue in this case and treated separately under the CAA. *Compare* 42 U.S.C. § 7475 (preconstruction permits) *with* 42 U.S.C. § 7661, *et seq.* (operation permits). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate

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6. The legislative history supports our interpretation. Indeed, according to the Joint Explanatory Statement of the Committee of Conference, §§ 7604(a)(3) and 7604(f)(3) permit citizens suits to redress "the violation of any condition or requirement specified by the State or the Administrator under a significant deterioration or non-attainment permit. . . ." *See* H. Conf. Rep. No. 564, at 173 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1502, 1554.

7. Although Appellants argued before the district court that this clause provides an alternative basis for jurisdiction, they have since abandoned that argument, most likely because it applies to operation permits and here, Appellants are challenging TXU's application for a preconstruction permit.

inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, we presume that by not including similar language for preconstruction permits, Congress did not intend, by virtue of § 7604(f)(3), to define "emission standard or limitation" to include conditions or requirements to obtain such permits.

2. Whether the definition of "emission standard or limitation," as set forth in § 7604(f)(4), is broad enough to include requirements for filing preconstruction permit applications?

The first clause of § 7604(f)(4) presents a much more difficult question. Appellants argue that because that clause defines "emission standard or limitation" to include "any other standard, limitation, or schedule established . . . under any applicable State implementation plan," *see* 42 U.S.C. § 7604(f), and such plans also contain preconstruction requirements, TXU can be deemed "to have violated . . . or be in violation of an emission standard or limitation" simply by filing a permit application without satisfying those requirements. The district court, noting that Appellants are challenging TXU's application for a preconstruction permit, rejected this argument on the ground that § 7604(f)(4) is limited, in its entirety, to operating permits. We disagree. It is true that § 7604(f)(4) was added as part of Title V of the CAA's operating permit program, *see* CAA Amendments, Pub.L. No. 101-549, Title III, § 302(f), Title VII, § 707(a)-(g), 104 Stat. 2574, 2682 (1990), and that certain clauses of that section are

expressly limited to operating permits.[8] However, the first clause is not so limited and broadly defines "emission standard and limitation" to include "any other standard, limitation, or schedule established . . . under any applicable State implementation plan." *Id.* The CAA further defines "applicable implementation plan" to include plans involving both preconstruction and operating permits. *See* 42 U.S.C. § 7602(q).[9] Thus, the district court erred in concluding that § 7604(f)(4), in its entirety, is limited to operating permits. *See Conservation Law Found., Inc. v. Romney*, 421 F.Supp.2d 344, 350 n. 6 (D.Mass.2006); *Cmtys. for a Better Env't v. Cenco Ref. Co.*, 180 F.Supp.2d 1062, 1082 (C.D.Cal.2001).

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8. For example, § 7604(f)(4) broadens the definition of "emission standard or limitation" to include "any other standard, limitation, or schedule established under any permit issued pursuant to title V" and "any permit term or condition, and any requirement to obtain a permit as a condition of operations." *See* 42 U.S.C. § 7604(f)(4).

9. That section provides:

> For purposes of this Act, the term "applicable implementation plan" means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 110 [involving preconstruction permit programs], or promulgated under section 110(c), or promulgated or approved pursuant to regulations promulgated under section 301(d) [involving operating permit programs] and which implements the relevant requirements of this Act.

42 U.S.C. § 7602(q).

TXU argues that the first clause of § 7604(f)(4) is inapplicable for a different reason. According to it, the terms "standards" and "limitations" in that clause refer only to "emission standards" and "emission limitations," which are further defined in the CAA to mean "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis[.]" *See* 42 U.S.C. § 7602(k). Thus, under its interpretation, because permit application requirements do not limit "the quantity, rate, or concentration of emissions of air pollutants on a continuous basis," they are not "emission standards" or "emission limitations" and, concomitantly, TXU cannot be deemed to have violated or be in violation of such standards and limitations simply by filing an alleged incomplete permit application. We disagree with TXU's basic premise that the terms "standards" and "limitations" in the first clause of § 7604(f)(4) refer only to "emission standards" and "emission limitations." Indeed, the plain text of that clause defines "emissions standards and limitations" to mean "any *other* standard, limitation, or schedule established . . . under any applicable State implementation plan." 42 U.S.C. § 7604(f)(4) (emphasis added). The use of the term "other" indicates that Congress intended those terms to mean something more than just "emission standards" and "emission limitations." We decline to import the word "emission" into a clause that does not expressly include it. *See Cmtys. for a Better Env't*, 180 F.Supp.2d at 1081; *see also Conservation Law Foundation v. FHA*, 24 F.3d 1465, 1477 n. 5 (1st Cir.1994)

("Defendants' use of the definition for 'emissions standard or limitation' provided in 42 U.S.C. § 7602(k) (a requirement 'established by the State or Administrator') is improper because § 7604(f) defines this term for all of § 7604, trumping the definition in § 7602(k).").[10]

Although we reject the district court and TXU's interpretations of § 7604(f)(4), we need not decide today whether the definition of "emission standard or limitation" is broad enough, by virtue of § 7604(f)(4), to encompass preconstruction requirements because even if that phrase is so defined, we fail to see how TXU could be held to violate those requirements simply by filing an incomplete permit application, in response to which a permit may or may not issue, especially when the permit process is still pending and subject to state judicial review. *See Miss. River Revival*, 107 F.Supp.2d at 1015; *Freeman*, 2005 WL 2837466, at *2. Indeed, the preconstruction requirements set forth in the Texas SIP, such as evidence that the facility will utilize the best available control technology, are preconditions for

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10. Moreover, TXU's interpretation would render superfluous another section, § 7604(f)(1), which already defines the phrase "emission standard or limitation" to include an "emission standard" or "emission limitation." *See* 42 U.S.C. § 7604(f)(1). "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations and citation omitted); *see also Hoffman v. Kramer*, 362 F.3d 308, 318 n.7 (5th Cir.2004).

granting a preconstruction permit, not preconditions for *filing* a preconstruction permit application. *See* 30 Tex. Admin. Code § 116.111(a). Presumably, an entity can file as many incomplete permit applications as it so chooses, but that does not mean in doing so, it is violating a preconstruction requirement or an emission standard or limitation. Moreover, the Eleventh Circuit has held, following a long line of district court cases, that "violations of the preconstruction permitting requirements occur at the time of construction." *Nat'l Parks & Conservation Ass'n v. TVA*, 502 F.3d 1316, 1322 (11th Cir.2007) (collecting cases and quoting *New York v. Niagara Mohawk Power Corp.*, 263 F.Supp.2d 650, 661 (W.D.N.Y.2003)). Here, the facility at issue has not yet begun construction and no permit has been issued. In short, we agree with the district court's ultimate conclusion that under the plain language of § 7604(a)(1), TXU's mere filing of an alleged incomplete permit application does not constitute a violation of an emission standard or limitation under the CAA and, concomitantly, that subject matter jurisdiction is lacking in this case.[11]

To the extent that Appellants argue that jurisdiction under § 7604(a)(1) is implied in this case, "[i]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Middlesex County Sewerage Auth. v. Nat'l Sea*

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11. Whether § 7604(a)(1) redresses alleged preconstruction violations against either TXU or the TCEQ once the permit issues and/or construction of the facility commences are issues we need not decide today.

Clammers Assn., 453 U.S. 1, 14-15 (1981). As the Supreme Court has explained, where Congress has provided "elaborate enforcement provisions" for remedying the violation of a federal statute—as Congress has done with the CAA—"it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under [the statute]." *Id.* at 14, 101 S.Ct. 2615 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)). Here, Congress and the EPA have set forth an elaborate enforcement scheme through which citizens have an opportunity to participate in public hearings and state court proceedings involving the issuance of any construction permit. *See* 42 U.S.C. § 7475(a)(2); *see also* Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia—Prevention of Significant Deterioration Program, 61 Fed.Reg. 1880 (Jan. 24, 1996) (to be codified at 40 C.F.R. pt. 52). It would seem odd then that Congress would simultaneously authorize citizens to bypass this process altogether and seek simultaneous review in federal court.[12]

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12. Appellants, citing Title V of the CAA, argue that such dual enforcement is common. Although Title V of the CAA provides for federal judicial review to evaluate the validity of an operating permit, *see* 42 U.S.C. § 7661d(b)(2), it only does so *after* the issuance of the permit and the subsequent denial of the aggrieved party's administrative petition for review. Thus, contrary to Appellants' interpretation, Title V does not provide for simultaneous federal review while the state operating permit process is still ongoing.

B. Whether § 7604(a)(3) authorizes preconstruction citizen suits against facilities that either have obtained a permit or are in the process of doing so?

The district court held that § 7604(a)(3) does not authorize preconstruction citizen suits against facilities that have either obtained a permit or are in the process of doing so. Instead, the district court interpreted that section as authorizing citizen suits when an entity proposes to construct or constructs a facility without a permit whatsoever. We agree with the district court's interpretation. Appellants interpret the phrase "without a permit" to mean "without a permit that complies with the CAA."[13] However, we decline to rewrite the plain

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13. Appellants cite legislative history to support their interpretation. According to the Senate amendment, "Section [7604] . . . is amended to allow a citizen to bring suit to prevent construction of a major emitting facility *without a permit in compliance with* [various sections of the CAA]." *See* H. Conf. Rep. No. 564, at 173 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1502, 1553 (emphasis added). Appellants interpret the phrase "without a permit in compliance with the CAA" to mean "without a permit that complies with the CAA." Thus, according to Appellants, a facility can be deemed to have violated § 7604(a)(3) simply by filing a permit application that fails to comply with the CAA. However, whether the use of word "compliance" in the Senate amendment necessarily means that Congress intended to authorize citizen suits to second-guess state agency permit determinations while those determinations are still pending is far from clear. Moreover, the subsequent House Conference Report, which concurs in the Senate amendment, omits the phrase "in compliance with" altogether and simply states that § 7604(a)(3) is amended so that "citizens suits are

(Cont'd)

language of the statute. Here, not only has TXU applied for a permit, it has since successfully obtained one, though still subject to state judicial review. Thus, it can hardly be said—as Appellants must in order for § 7604(a)(3) to apply—that TXU is proposing to construct or constructing a facility "without a permit." *See Ogden Projects v. New Morgan Landfill Co.*, 911 F.Supp. 863, 867-68 (E.D.Pa.1996) (indicating that § 7604(a)(3) authorizes citizen suits when facility is proposing to construct plant without a permit at all); *see also Heisen v. Pacific Coast Bldg. Prods., Inc.*, No. 93-16213, 1994 WL 250029, *1 (9th Cir. Jun. 9, 1994) (unpublished) (rejecting attempt to utilize § 7604(a)(3) to collaterally attack issuance of permit by alleging that facility submitted fraudulent information to obtain it). In short, we agree with the district court that § 7604(a)(3) does not authorize preconstruction citizen suits against facilities that have either obtained a permit or are in the process of doing so.

(Cont'd)

authorized against sources to enforce compliance only with respect to . . . any proposal to construct or the construction of any new or modified major emitting facility *without a permit* under the prevention of significant deterioration provision or the nonattainment provisions." *See* H. Conf. Rep. No. 564, at 173 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1502, 1554 (emphasis added). Thus, the legislative history is less than determinative and far from helpful.

IV. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.[14]

AFFIRMED.

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14. Because we find the district court lacks subject matter jurisdiction in this case, we do not address the remaining justiciability and abstention issues reached by that court.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, WACO DIVISION DATED AND FILED MAY 21, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. W-06-CA-355

CLEANCOALITION AND ROBERTSON COUNTY: OUR LAND, OUR LIVES,

Plaintiffs,

v.

TXU POWER, A D/B/A OF TXU GENERATION COMPANY LP, OAK GROVE MANAGEMENT COMPANY LP, AND TXU CORPORATION,

Defendants.

ORDER

Before the Court is Defendants Oak Grove Management Company LLC, TXU Power, a D/B/A of TXU Generation Company LP, And TXU Corp.'s Motion To Dismiss. The Court held a hearing on this Motion on March 23, 2007. Having heard the arguments of the parties and reviewed the Motion, Response, Reply, pleadings, and applicable legal authority, the Court finds that the Motion has merit and should be granted.

Appendix B

I. BACKGROUND

The project at issue in this case is proposed by Oak Grove Management LLC ("Oak Grove") and consists of the construction and development of a 1,720 MW power generating facility in Robertson County ("the Project"). The proposed facility will be fueled by Texas-mined lignite. The Project will help fulfill a demand for generation of power in Texas, and will result in approximately 1,800 on-site construction jobs, permanent employment of almost 2,000 persons, and approximately $800 million in spending.

In order to construct the Project, on July 27, 2005, Oak Grove applied to the Texas Commission on Environmental Quality ("TCEQ") for an air permit, which includes a preconstruction authorization under the Prevention of Significant Deterioration ("PSD") Program of the federal Clean Air Act ("CAA").[1] Oak Grove subsequently updated its application, and on February 21, 2006, the TCEQ completed a technical review of the application and issued a preliminary decision and draft permit.

Oak Grove then requested that the TCEQ refer the permit application to the State Administrative Office of Hearings ("SOAH") for a hearing to determine whether it complied with statutory and regulatory requirements. Plaintiff Robertson County: Our Land, Our Lives ("RCOLOL") participated as a party in the hearing before SOAH. A Proposal for Decision was issued by

1. *See* Plaintiff's Complaint, ¶¶ 13, 25.

SOAH on August 23, 2006. This decision is currently being reviewed by the TCEQ to determine whether the permit should issue.

On December 1, 2006, Plaintiffs CleanCoalition and RCOLOL filed a citizen suit pursuant to the federal CAA against Defendants TXU Power, a d/b/a of TXU Generation Company, LP, Oak Grove Management Company, LLC, and TXU Corporation (collectively "Defendants") regarding the Project. Defendants have now filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

II. LEGAL AUTHORITY

A. Standard of Review

Rule 12(b)(1) demands dismissal if the court lacks jurisdiction over the subject matter of the plaintiff's claims. Fed. R. Civ. P. 12(b)(1); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996). The burden of proof in a Rule 12(b)(1) motion to dismiss rests with the party asserting jurisdiction. *See Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889 (5th Cir. 1984); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980). "'A case is

properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case.'" *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996)). When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. *Ramming*, 281 F.3d at 161. This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice. *Id.*

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 at 598 (1969). It is well settled that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Boudeloche v. Grow Chemical Coatings Corps.*, 728 F.2d 759, 762 (5th Cir. 1984); *Kaiser*, 677 F.2d at 1050. When considering such a motion, the complaint must be liberally construed in the plaintiff's favor, and all facts well pleaded in the complaint should be accepted as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986). "The question therefore is whether in the light most favorable to Plaintiff and with every doubt resolved in his behalf, the complaint states any valid

claim for relief." 5 Wright and Miller, *Federal Practice and Procedure*, Section 1357 at 601.

B. Statutory and Regulatory Background

Congress established in the CAA "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The Act makes clear, however, that "air pollution prevention . . . and air pollution control at its source is the *primary* responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added); *see also id.* § 7407(a). Thus, while the CAA assigns EPA the responsibility for establishing national ambient air quality standards ("NAAQS") *(i.e.*, the standards for the air we breathe) for certain pollutants, *see* 42 U.S.C. § 7409, the Act assigns the States the responsibility for ensuring compliance with them through "State Implementation Plans" or "SIPs." *See id.* §§ 7407(a), 7410(a).

The SIPs are comprised of State regulations that, among other things, set emission limitations for sources in the State so as to meet and maintain the NAAQS. SIPs include permitting programs such as the PSD program cited in the Complaint. EPA must approve the SIP for it to become effective under the federal CAA (and such EPA approval is subject to judicial review in the U.S. Court of Appeals, *see* 42 U.S.C. § 7607(b)(1)). But EPA has no authority to second-guess the State's choice of emission limitations, so long as the SIP

achieves its ultimate purpose of attaining and maintaining the NAAQS. *See Train v. NRDC*, 421 U.S. 60, 79 (1975); *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976).

In 1977, Congress enacted the PSD program at issue in this case. 42 U.S.C. §§ 7470-7492. Like the NAAQS program, PSD is implemented and enforced primarily by the States through their SIPs. *See, e.g., Alaska Dep't Envt'l Conserv. v. EPA*, 540 U.S. 461, 491 (2004) *(ADEC)* (citing 57 Fed. Reg. 28,095 (1992) ("[S]tates have the primary role of administering and enforcing the various components of the PSD program.")) The PSD program is a comprehensive permitting scheme for "major emitting facilities" in areas of the country that are designated having attained the NAAQS (or are "unclassifiable" with respect to the NAAQS). Thus, the cornerstone requirement of the PSD program is that a new source (of a type and size subject to PSD) must obtain a PSD permit before "construction is commenced." 42 U.S.C. § 7475(a)(1). Once the State's PSD program is approved as a part of the SIP, it is the State permitting authority, not EPA, that issues a PSD permit for new facilities in that State.

Congress set both substantive and procedural requirements that PSD permits must meet. The substantive requirements include: (i) a demonstration that the emissions from the new source will not adversely affect air quality, *id.* §§ 7473, 7475(a)(3); (ii) installation of the "best available control technology," or "BACT," which is determined on a case-by-case basis by the State

permitting agency, exercising its judgment on technical issues and taking into account energy, environmental, and economic impacts and other costs, *id.* §§ 7475(a)(4), 7479(3), *see ADEC*, 540 U.S. at 472-73, 494; (iii) satisfaction of any applicable "Class I" area protection requirements, 42 U.S.C. § 7475(a)(5); (iv) analysis of any secondary air quality impacts, *id.* § 7475(a)(6); and (v) monitoring requirements, *id.* § 7475(a)(7).

Congress also required elaborate procedural safeguards for States to issue permits, including a public hearing and an opportunity for any interested person to appear and submit comments on a proposed permit. *Id.* § 7475(a)(2). A State's PSD program must contain procedures that implement at least all of these statutory requirements—substantive and procedural—to be "approvable" as part of a SIP. Furthermore, EPA has interpreted the Act to require adequate procedures for judicial review in State court of PSD permits issued by a State before EPA will approve a PSD program into the SIP. 61 Fed. Reg. 1,880, 1,882 (1996); *see ADEC*, 540 U.S. at 508 (Kennedy, J., dissenting).

The State of Texas has a SIP-approved PSD program that EPA found complies with all of the procedural and substantive requirements of the statute, and that program is administered by the TCEQ. *See* 67 Fed. Reg. 58,697-58,711 (2002). Under this approved program, before construction can begin on proposed new facilities that may emit air contaminants, the person planning the construction must obtain a preconstruction permit from the TCEQ. Tex. Health & Safety Code Ann.

§ 382.0518. Preconstruction PSD permits are required for proposed "major stationary source" facilities, such as the Project, located in "attainment areas," such as Robertson County. 30 Tex. Admin. Code §§ 116.111(a)(2)(I), 116.160-63. In reviewing a PSD permit application, the TCEQ provides opportunity for public comment. 30 Tex. Admin. Code Ann. § 55.150 *et seq.* Additionally, persons may request and participate in contested case hearings before the SOAH if they are granted party status. *Id.* § 55.200 *et seq.* The Texas air permit process also provides for judicial review in state court in Travis County of the TCEQ's decision to issue a permit. Tex. Gov't Code Ann § 2001.001 *et seq.*

C. Citizen Suits

Section 7604 is the sole source of authority for citizen suits under the federal CAA. This provision authorizes citizen suits in only three circumstances:

> (1) Against any person who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,
>
> (2) Against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which

> is not discretionary with the Administrator,[2] or
>
> (3) Against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of title I [42 USCS §§ 7470 et seq.] (relating to deterioration of air quality) or part D of title I [42 USCS §§ 7501 et seq.] (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

42 U.S.C. §§ 7604(a)(1) - (3).[3]

D. Statutory Construction

Statutory construction begins with the plain language of a statute, but "plain" does not always mean "indisputable" or "pellucid." *Aviall Servs. v. Cooper Indus.*, 312 F.3d 677, 680 (5th Cir. Tex. 2002), *rev'd on other grounds*, 543 U.S. 157 (2004). Consequently, sound interpretation reconciles the text of a disputed provision with the structure of the law of which it is a part; may draw strength from the history of enactment of the provision; and acknowledges the legislature's general policies so that the interpretation does not become absurd. *Id.* (citing *Crandon v. United States*, 494 U.S.

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2. 42 U.S.C. § 7604(a)(2) is not at issue in this case.

3. CAA §§ 304(a)(1) - (3).

152, 158, 110 S. Ct. 997, 1001, 108 L. Ed. 2d 132 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *Perrone v. GMAC*, 232 F.3d 433, 440 (5th Cir. 2000) (stating that use of legislative history is appropriate where statutory text is "opaque," "translucent," or "ambiguous"), *cert. denied*, 532 U.S. 971 (2001); *United States v. A Female Juvenile*, 103 F.3d 14, 16-17 (5th Cir. 1996) ("Axiomatic in statutory interpretation is the principle that laws should be construed to avoid an absurd or unreasonable result."); *In re Timbers of Inwood Forest Assocs., Ltd.*, 793 F.2d 1380, 1384 (5th Cir. 1986) ("Each part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole. Thus it is not proper to confine interpretation to the one section to be construed.")).

III. ARGUMENTS AND ANALYSIS

A. Standard of Review

Plaintiffs argue that because Defendants seek relief under Rules 12(b)(1) and 12(b)(6), Defendant's requested relief should be evaluated solely under Rule 12(b)(6). *See Williamson v. Tucker*, 645 F.2d 404, 415-16 (5th Cir. 1981). Plaintiffs assert that when a defendant challenges both the court's jurisdiction and the existence of a federal cause of action, the Fifth Circuit requires a court to find that jurisdiction exists and deal with the objection as a direct attack on the merits.

Appendix B

Plaintiffs argue that questions of subject matter jurisdiction and the merits are normally considered "intertwined" where a statute provides both the basis of federal subject matter jurisdiction and the cause of action. *Clark v. Tarrant County, Tex.*, 798 F.2d 736, 742 (5th Cir. 1986). Plaintiffs assert that both the subject matter jurisdiction and the causes of action are provided by 42 U.S.C. § 7604.

Defendants assert that it is not necessary to address the "merits" of Plaintiffs' case in order to rule on Defendants' Motion. Defendants argue that all facts necessary to grant Defendants' Motion are admitted in Plaintiffs' Complaint because Plaintiffs admit that an application for a permit is pending before the TCEQ, that construction has not commenced, and that no permit has yet been issued on the pending application. Even if the issue of jurisdiction were held to be intertwined with the merits, Defendants argue that the Complaint would still be subject to a facial attack under Rule 12(b)(1), and if it fails to survive that challenge, dismissal under Rule 12(b)(1) is appropriate. *See Lewis v. Knutson*, 699 F.2d 230, 237 (5th Cir. 1983).

The Fifth Circuit stated in *Lewis*:

> In the special case where the challenged basis of jurisdiction is also an element of plaintiff's federal cause of action, the proper course of action is to limit the jurisdictional inquiry to facial scrutiny, and reserve the factual scrutiny for the merits of the cause of action.

> *See Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S. Ct. 396, 70 L. Ed. 2d 212 (1982) (quoting *Bell v. Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 776, 90 L. Ed. 939 (1945)). If the facial attack defeats jurisdiction, the case should be dismissed under Rule 12(b)(1). If the case survives the facial jurisdictional attack, a failure of the existence of the cause of action should be disposed by a Rule 12(b)(6) dismissal on the merits. *See, e.g., Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876, 886 & n. 9 (5th Cir.1982). Conversely, if the jurisdictional challenge does not implicate the merits of the cause of action, the jurisdictional basis must survive both facial and factual attacks before the district court can address the merits of the claim. *See Williamson*, 645 F.2d at 412-15 & n. 9.

699 F.2d at 237. As Defendants argue, whether or not the issue of jurisdiction is intertwined with the merits in this case, Plaintiffs' Complaint is subject to a facial attack under Rule 12(b)(1). Accordingly, the Court will limit its jurisdictional inquiry to facial scrutiny. *See Williamson*, 645 F.2d at 415.

Appendix B

B. Section 304(a)(1)

Defendants argue there is no jurisdiction under section 304(a)(1). First, Defendants argue that a project that does not exist has zero emissions; thus, it cannot be in violation of emission standards let alone have repeated violations. *See Sugarloaf Citizens Ass'n v. Montgomery County*, 33 F.3d 52 (Table), No. 93-2475, 1994 U.S. App. LEXIS 21985, at *20 n.9 (4th Cir. Aug. 17, 1994) (finding lack of citizen suit jurisdiction on grounds that defendants "have all of the permits required for the construction of this facility, and until construction is completed . . . , can neither begin emissions nor violate any emissions standard"). Second, Plaintiffs' suit is premised on a permit application. Defendants argue that a permit application itself cannot violate an "emission limitation;" thus, a citizen suit cannot be based on a permit application. *See Freeman v. Cincinnati Gas & Electric Co.*, 2005 U.S. Dist. LEXIS 42524, *6-7 (S.D. Ohio October 27, 2005) (unpublished) (holding that a proposed Title V air permit cannot form the basis of a citizen suit); *Mississippi River Revival, Inc. v. EPA*, 107 F. Supp. 2d 1008, 1015 (D. Minn. 2000) (construing the Clean Water Act citizen suit provision, which was modeled after CAA § 304(a)(1), and finding that it "does not authorize jurisdiction for an action challenging the contents of a permit application.").

Plaintiffs first respond that the only requirement under section 304(a)(1) is that they must provide 60 days notice, which they assert they provided to Defendants. Plaintiffs also assert that the Court should consider the

definition of "emission standard or limitation" in section 304(f). Plaintiffs argue that the statute defines "emission standard or limitation" to include, among other things, PSD requirements and SIP requirements. Plaintiffs argue that violations of both PSD requirements and SIP requirements will support a citizen suit under section 304(a)(1). *See New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650, 663 (W.D.N.Y. 2003). However, Plaintiffs also argue that the definition is much broader because Courts construe the term to mean "any type of control to reduce the amount of emissions in the air." *See NRDC v. EPA*, 489 F.2d 390, 394 n.2 (5th Cir. 1974), *rev'd on other grounds sub nom. Train v. NRDC*, 421 U.S. 60 (1975). Plaintiffs assert the broad construction stems from the definition in (f)(4): "any other standard, limitation, or schedule established under any permit issued pursuant to title V [ ] or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations." 42 U.S.C. § 7604(f)(4). Plaintiffs argue that because Congress included this language regarding requirements to obtain a permit, Congress intended that a section (a)(1) claim may be based on a violation of any pre-permit requirements imposed to obtain a permit. Thus, Plaintiffs assert that it is possible to violate an emission standard or limitation before a permit is issued. Plaintiffs allege that Defendants violated pre-permit requirements including "best available control technology" ("BACT") analysis, PSD requirements during the permit application process, SIP requirements during the permit application process,

and federal and state requirements imposed in order to "obtain a permit" prior to beginning operation.

Defendants reply that Plaintiffs have paraphrased the statutory definition of "emission standard or limitation" and eliminated key language. Defendants argue that this section does not define "emission standard or limitation" in terms of "PSD" requirements" but, rather *"any condition or requirement of a permit under"* the PSD provisions. 42 U.S.C. § 7604(f)(3) (emphasis added). Defendants assert that there is no allegation in the Complaint that they are in violation of any requirements or conditions of a PSD permit; thus, because no permit has been issued, there is no "condition or requirement of a permit" and no "emission standard or limitation" at issue under section 304(f)(3). Defendants argue that the language in section 304(f)(3) regarding SIPs applies only to transportation control measures, vehicle maintenance and inspection plans, and other topics not related to PSD or this case. Defendants argue that language in section 304(f)(4) regarding SIPs clearly applies to "any other standard, limitation, or schedule established . . . under any applicable State implementation plan," and not the SIP generally. Lastly, Defendants state that section 304(f)(4) was added in 1990 as part of the Title V *operating* permit program and is separate and apart from the PSD *construction* permit program at issue in this case; thus, it is not applicable here.

The Court finds that it lacks jurisdiction under section 304(a)(1). Section 304(a)(1) allows a citizen suit

against any person who is alleged to have violated or who is in violation of an emission standard or limitation under the Act. 42 U.S.C. § 7604(a)(1). The definition of "emission standard or limitation" in section 304(f)(4) is not applicable here because it applies to the operating permit program. Plaintiffs have excluded key terms in the definition in section 304(f)(3) to support their argument. The definition states "any condition or requirement *of a permit* under" the PSD provisions. *See* 42 U.S.C. § 7604(f)(3) (emphasis added). Because Plaintiffs do not allege any condition or requirement of an issued permit in their Complaint, there is no "emission standard or limitation" to consider under section 304(a)(1). Based on the plain language of section 304(a)(1) and 304(f)(3), because no permit has issued for the Oak Grove project and the Plant does not yet exist, it cannot be in violation of any emission standards or limitations. *See id.* §§ 7604(a)(1), (f)(3); *Sugarloaf Citizens*, 1994 U.S. App. LEXIS 21985, at *20 n.9. Thus, providing 60 days notice is not the only requirement under section 304(a)(1). There must be an alleged violation of a condition or standard of an issued permit.

Next, the Court distinguishes the *Niagara Mohawk* case. In *Niagara Mohawk*, the defendants built a facility without obtaining a permit *at all*. *See Niagara Mohawk*, 263 F. Supp. 2d at 654. Thus, the State brought a citizen suit against the defendants under section 304(a)(1) and 304(a)(3). The district court held that some of the claims were time barred but the citizen suit was proper. Specifically under section 304(a)(1), the court stated the permitting authority did not even have the opportunity

to conduct a BACT analysis because of defendants failure to follow the proper preconstruction procedures. *Id.* at 663. Thus, the Court held that it would not be proper to allow defendants to frustrate the goals of the statute by dismissing Plaintiff's claims under section 304(a)(1) because it appeared uncontroverted "that if BACT had been determined by the permitting authority and the Facilities were not in compliance, suit would be authorized under" section 304(a)(1). *Id.* In contrast, the TCEQ is still determining BACT for the Oak Grove project as the State permitting process is not yet complete for Plaintiffs' permit application.

Lastly, Defendants' permit application itself cannot violate an emission standard or limitation, which is all that Plaintiffs have alleged that Defendants have done to this point. *See Mississippi River*, 107 F. Supp. 2d at 1015; *Freeman*, 2005 U.S. Dist. LEXIS 42524 at *6-7. Congress expressly intended that the establishment of an alleged violation not involve the "reanalysis of technological or other considerations at the enforcement stage." *Citizens Ass'n v. Washington*, 535 F.2d 1318, 1322 (D.C. Cir. 1976). If Plaintiffs believe Defendants' permit application contains information that may lead to potential violations of emissions standards or limitations when the Oak Grove project is constructed, the State permitting process provides an opportunity for their comments to be heard, and the TCEQ is the proper authority to conduct a technical review of those comments.

C. Section 304(a)(3)

Defendants argue there is no jurisdiction under section 304(a)(3). First, Defendants assert that Oak Grove has never stated any intention to construct the plant without a permit—Plaintiffs even admit that Oak Grove has submitted an application for a PSD permit, and, at this time, the permit process is ongoing. Second, Defendants argue that section 304(a)(3) does not provide jurisdiction over complaints that a permit application is allegedly defective. Defendants argue that section 304(a)(3) only authorizes suit for a failure to obtain a permit at all. *See Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863, 867-68 (E.D. Pa. 1996) ("[A] substantive challenge to the conditions of the permit would lie in state court, challenges based on the state's failure to require a permit at all are proper in federal court."). Defendants assert that these circumstances are not met here because Oak Grove has applied for a permit, the TCEQ has determined that a permit is required, and the TCEQ is determining whether the permit should issue and any terms and conditions that may be necessary. Defendants assert that the review of any permit granted and its terms and conditions would occur in state court.

Plaintiffs argue that a permit based on a defective application is not a permit in compliance with section 304(a)(3). Plaintiffs assert that a permit: (1) must be based on supporting materials submitted by the applicant and its agents; (2) must arise from a proper BACT analysis; and (3) must set forth the parameters

that will apply to the construction and operation of the proposed facility. 42 U.S.C. § 7475(a). Plaintiffs assert that an entity that proposes to construct a facility based on a defective application is proposing to construct a facility "without a permit required under part C." Plaintiffs allege that Defendants did not, among other things, satisfy Part C permit requirements, which include:

> (1) analysis as to the proposed permit be conducted in accordance with applicable standards;
>
> (2) demonstrate that emissions from construction or operation of the Oak Grove Plant will not cause, or contribute to, air pollution in excess of the relevant standards;
>
> (3) proposed facility be subject to BACT for each pollutant subject to regulation under this chapter emitted from or which results from, such facility;
>
> (4) analysis of any air quality impacts projected for the area as a result of growth associated with such facility; and
>
> (5) owner/operator agree to conduct the required monitoring.

42 U.S.C. § 7475(a)(2)-(4), (6)-(7). Plaintiffs argue that a permit issued on the basis of a defective application also

violates Part C. Thus, Plaintiffs assert that construction of a facility pursuant to the non-compliant permit would then violate Part C because the construction would occur without a permit that satisfies the Part C requirements. Plaintiffs argue that because of the cascading effect of a permit application violation, the CAA allows a citizen to sue before a facility is constructed based on a proposal to construct that does not comply with the PSD requirements for a permit application. Plaintiffs assert that under Defendants' interpretation of section 304(a)(3), there would never be a section 304(a)(3) violation unless it could be brought pre-permit. Lastly, Plaintiffs argue that the Court should follow the U.S. Supreme Court in *ADEC* where it allowed the EPA to seek judicial review of the reasonableness of a state permitting agency's BACT determination in issuing a PSD permit. *See ADEC*, 540 U.S. at 484-93.

Defendants reply that Plaintiffs reading of section 304(a)(3) is an attempt to rewrite the phrase "without a permit required under [PSD or nonattainment NSR]" to "without a permit that complies with [PSD or nonattainment NSR] . . . ." Defendants argue that this is not what the statute says and is not what Congress intended the statute to say. Defendants argue that determining the adequacy of information and analyses included in a permit application and setting the terms and conditions of a permit are clearly not the types of actions that could give rise to "clear cut" violations Congress intended such as not obtaining "a permit at all."

Appendix B

The Court finds that it lacks jurisdiction under section 304(a)(3). Section 304(a)(3) allows a citizen suit against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C. 42 U.S.C. § 7604(a)(3). Based on the plain language of the statute, the Court finds that Congress intended the violation in this provision to be proposing to construct or constructing a facility without a permit *at all* (or violating an existing permit). *See Ogden Projects*, 911 F. Supp. at 867-68. Congress did not intend a federal CAA violation for proceeding through the permitting process, which would include determining the adequacy of information and analyses proposed in the permit application and setting the terms and conditions of the permit. The determination of whether an entity is a polluter for purposes of section 304 is to be made against the objective standards in the administrative proceedings, not in federal court. *See Citizens Ass'n*, 535 F.2d at 1322. Congress did intend this provision to allow a federal court in a citizen suit to force a party to get a permit if it is going to build a major emitting air facility (or to enforce the terms of an existing permit). Here, Oak Grove applied for a permit, TCEQ determined that a permit is required, and the TCEQ is now determining whether the permit should issue and any terms and conditions that may be necessary. Any review of the permit and its terms and conditions would only be proper in state court in Travis County.

Lastly, the Court distinguishes the *ADEC* case. Section 113(a)(5) of the CAA authorizes EPA to bring

an enforcement action to prohibit construction if it "finds that a State is not acting in compliance with *any requirement* or prohibition of the chapter relating to the construction of new sources" (including the PSD provisions). 42 U.S.C. § 7413(a)(5); *see also id.* § 7477 (authorizing EPA to enforce if construction does not conform to the "requirements" of PSD). In *ADEC*, the U.S. Supreme Court relied on the "any requirement" language in sections 113(a)(5) and 167 to find that EPA had the authority to enforce all of the individual requirements of PSD. *See ADEC*, 540 U.S. at 484-85. Thus, Congress gave the EPA broad jurisdiction to enforce all requirements of PSD, including the requirement to obtain a permit before construction. In contrast, under the citizen suit provisions, Congress gave limited jurisdiction to the violation of the requirement to obtain a permit before commencing construction (or for violating an existing permit). *See* 42 U.S.C. § 7604(a)(3). Here, Plaintiffs are not the EPA, they cannot step into the shoes of the EPA, and the EPA has not joined their suit; thus, the *ADEC* case is distinguishable.

D. Case or Controversy

Defendants also argue that there is no case or controversy because Plaintiffs are seeking an advisory opinion. They assert that any relief granted by this Court would not be conclusive as to the issues raised because Plaintiffs attack a mere permit application, and it is the TCEQ that is responsible for reviewing the application, determining its sufficiency, and issuing a

permit with the terms and conditions it deems are appropriate. *See* 30 Tex. Admin. Code Ann. §§ 116.111(a)(2)(C); 116.114(a); 116.160(c); 116.160(d). Defendants argue that even if the Court had the jurisdiction to review the sufficiency of the permit application and tell the TCEQ whether it is sufficient, the TCEQ is not before this Court; thus, any decision by the Court would be advisory.

Further, Defendants argue that Plaintiffs lack standing. Plaintiffs state that their alleged injury is they have "interests" in, among other things, breathing air, enjoying outdoor recreation, scenery, and property, and that the alleged deficiencies in the permit application diminish these interests. Defendants assert that there is no causal connection between the alleged injury and the challenged conduct (*i.e.*, information contained in a permit application), and their alleged injury is not fairly traceable to Oak Grove's conduct but to independent action of the TCEQ, which is not before the Court. Additionally, Defendants assert a claim is not redressable if parties needing to be bound in order for the relief to be effective are not before the Court or if the requested relief is beyond the authority of the court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Baca v. King*, 92 F.3d 1031, 1037 (10th Cir. 1996). Defendants argue that the TCEQ is not before the Court, and terms and conditions of a permit are matters within the TCEQ's discretion but there is no assurance that TCEQ ultimately would issue the permit in a way that addresses Plaintiffs' complaints.

Appendix B

Plaintiffs assert that their federal CAA claims embody a "case or controversy." Plaintiffs assert that regardless of what the TCEQ decides, Defendants have violated the law independently. Further, Plaintiffs argue that because TCEQ might later take action regarding Defendants' application does not make Plaintiffs' claims moot or unripe. Plaintiffs assert that there is no difficulty in fashioning a remedy because they simply seek an injunction prohibiting Defendants from violating emissions standards and limitations and from constructing a facility without a permit required by Part C.

In addition, Plaintiffs assert that they do have standing because they allege intermediate violations that are properly the subject of a citizen suit. These intermediate violations concern the proposed Oak Grove Plant, which affects the areas in which Plaintiffs live, work, and recreate. Thus, Plaintiffs argue they have a concrete interest in requiring Defendants to comply with the requirements of the federal CAA, and any injury to Plaintiffs is traceable back to Defendants' violations of the law. Plaintiffs argue that the CAA requirements are not intended only to control ultimate emissions, but also to assure that any decision to permit increased air pollution is made only after careful intermediate evaluation of the possible consequences. 42 U.S.C. § 7470(5). Plaintiffs assert that Defendants, not the TCEQ, are responsible for the Oak Grove Plant's construction; thus, if the Court enjoins Defendants from construction in violation of the law, the injury will be redressed. They assert that joinder of TCEQ is unnecessary to achieve that goal.

The Court finds there is no case or controversy. Plaintiffs are seeking an advisory opinion because this Court is not the responsible authority for reviewing permit applications, determining their sufficiency, and issuing permits with the terms and conditions that are appropriate under the law. The TCEQ has this authority, and the TCEQ is not before this Court. Further, Plaintiffs lack standing because there is no causal connection between their alleged injuries and the permit application. The Court has already held that alleged "intermediate" violations in a permit application do not support a federal CAA citizen suit, which supports Plaintiffs' lack of standing. The TCEQ has the authority to address Plaintiffs' concerns, not this Court.

E. *Burford* Abstention

Alternatively, Defendants argue that if the Court has jurisdiction, it should abstain from exercising jurisdiction under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* abstention is appropriate where "timely and adequate state court review is available and where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 314 (5th Cir. 1993) (internal quotations and citations omitted). Several factors are relevant in making this determination: (1) whether the cause of action arises under federal or state law; (2) whether the case requires inquiry into unsettled issues of state law; (3) the importance of the

state interest involved; (4) the state's need for a coherent policy in that area; and (5) the presence of a special state forum for judicial review. *Id.*

Defendants argue that all of the factors weigh in favor of *Burford* abstention. First, Defendants assert that Plaintiffs' cause of action, while asserted as a citizen suit under the federal CAA, involves alleged violations of state law and an attack on the state permitting process. Defendants argue that regulation and control of air pollution is recognized as an important state function. 42 U.S.C. § 7401(a)(3). Second, the state needs a coherent policy on the issues raised by Plaintiffs' claims because resolution of these issues may affect other pending or proposed applications for permits for coal-fired power plants, as well as air permitting in Texas in general. Lastly, the TCEQ already has primary jurisdiction for reviewing permit applications and making the very technical determinations the Plaintiffs are asking this Court to make. *See* 42 U.S.C. § 7479(3) (BACT determination is made by the "permitting authority"); 30 Tex. Admin. Code Ann. §§ 116.111(a)(2)(C); 116.114(a); 116.160(c); 116.160(d). Further, a contested case hearing before the specialized SOAH was held in which many of the very issues before the Court were heard. Defendants state that when the permit is issued, Plaintiffs may sue the TCEQ in state court in Travis County over that decision. Tex. Gov't Code Ann. §§ 2001.171 *et seq.*

Plaintiffs argue that *Burford* abstention does not apply. Plaintiffs assert that their claims arise squarely

under federal law, and any state laws and regulations at issue were enacted pursuant to authority delegated from the federal government. Plaintiffs also assert that this case does not involve inquiry into unsettled state law or local facts—the main dispute in this case is whether Defendants violated the federal CAA by not providing certain information and conducting certain analyses in applying for permits and proposing to construct the Oak Grove Plant. Plaintiffs further assert that clean air is not a matter of mere local concern, and any interest in cohesive local policy is equally served by the federal court's exercise of jurisdiction. Lastly, Plaintiffs argue that there is no special state forum for judicial review of federal CAA claims. *See* 42 U.S.C. § 7604(a).

Alternatively, if this Court did have jurisdiction, it would exercise *Burford* abstention. While Plaintiffs style their case as a federal CAA cause of action, the Court finds that it attacks Defendants' permit "application" and is essentially a collateral attack on the Texas permitting process. The TCEQ has jurisdiction to review permit applications, not this Court, and if a permit issues, Plaintiffs would file suit against the TCEQ in state court.

Appendix B

IV. CONCLUSION

Having heard the arguments of the parties and reviewed the Motion, Response, Reply, pleadings, and applicable legal authority, the Court finds that it lacks subject matter jurisdiction over Plaintiff's citizen suit under sections 304(a)(1) and 304(a)(3). Further, the Court finds that there is no case or controversy. Alternatively, the Court finds that if it did have jurisdiction, it would exercise *Burford* abstention. Defendant's Motion To Dismiss will be granted.

In light of the foregoing, it is

ORDERED that Defendants Oak Grove Management Company LLC, TXU Power, a D/B/A of TXU Generation Company LP, And TXU Corp.'s Motion To Dismiss is **GRANTED**. It is further

ORDERED that any and all motions or requests not previously ruled upon by this Court are **DENIED** as moot.

SIGNED on this 21st day of May, 2007.

s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
CHIEF UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
NOV 4 - 2008
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No. 08-533

IN THE
Supreme Court of the United States

CLEANCOALITION; ROBERTSON COUNTY: OUR LAND, OUR LIVES,

Petitioners,

v.

TXU POWER, doing business as TXU GENERATION COMPANY LP; OAK GROVE MANAGEMENT COMPANY LLC; and TXU CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF

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BASES FOR SUPPLEMENTAL BRIEF

Petitioners CleanCOALition and Robertson County: Our Land, Our Lives (collectively, "CleanCOALition") filed a Petition for Writ of Certiorari (the "Petition") on October 20, 2008. CleanCOALition argued courts, including the lower courts in this matter, have subverted Congress's intended enforcement and operation of the Clean Air Act ("CAA") by:

1. Disregarding that Congress intended CAA section 304(a)(1), 42 U.S.C. § 7604(a)(1), to authorize suit for violations that occur before a person obtains a Prevention of Significant Deterioration ("PSD") permit.[1]

2. Disregarding that Congress intended CAA section 304(a)(3), 42 U.S.C. § 7604(a)(3), to create a cause of action against a person that proposes to construct or constructs a facility without a *valid* permit.

3. Holding courts can use the "abstention" doctrine created in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), to dismiss properly filed citizen suits.

One week after CleanCOALition filed its Petition, the United States Court of Appeals for the Seventh Circuit issued an opinion in *Sierra Club v. Franklin County Power of Illinois, LLC*, No. 06-4045, 2008 WL

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[1] The CAA's PSD provisions are found at CAA sections 160-169, 42 U.S.C. §§ 7470-7492.

4693519 (7th Cir. Oct. 27, 2008). The Seventh Circuit: (1) held CAA section 304(a)(3) allows a cause of action when a person proposes to construct a facility with an *invalid* permit and (2) held a person can challenge PSD violations under section 304(a)(3) even *before* a facility is constructed.

These holdings support arguments CleanCOALition asserted in its Petition, and otherwise give rise to circuit conflicts regarding the proper operation of the CAA citizen suit provisions. In this Supplemental Brief, CleanCOALition therefore discusses *Sierra Club* as additional support for its contentions and as an additional basis for the Court to grant CleanCOALition's Petition. *See* Supreme Court Rule 10(a) (indicating the Court may grant review on a writ of certiorari if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . .").

SUPPLEMENTAL ARGUMENTS

A. Summary of *Sierra Club v. Franklin County Power of Illinois, LLC*

A PSD permit expires if a recipient does not "commence construction" of a "facility" within eighteen months after the permit is issued, or if the recipient discontinues construction for eighteen months or longer. *See* 40 C.F.R. § 52.21(r)(2). The dispute in *Sierra Club* related to whether a defendant was prohibited from constructing a facility with an allegedly expired, thus invalid, PSD permit.

On July 3, 2001, the Illinois Environmental Protection Agency ("IEPA") issued Franklin County Power of Illinois, LLC ("Franklin Power") a PSD permit to construct a power plant. 2008 WL 4693519 at **1, 2. Franklin Power failed to "commence construction" of its plant within eighteen months, and in the alternative, discontinued construction longer than eighteen months. *Id.* at **9-10. The Sierra Club alleged Franklin Power's PSD permit became invalid. *Id.* at *1. Franklin Power contended the PSD permit remained valid and indicated it still intended to construct its plant with the permit. *Id.* at **5, 9.

The Sierra Club sued Franklin Power under CAA section 304(a)(3), contending Franklin Power was "propos[ing] to construct . . . [a CAA] facility without a permit required under part C of subchapter I of [the CAA] . . . ." *See id.* at *1. In defense, Franklin Power contended, *inter alia*, Sierra Club did not have authority to bring a section 304(a)(3) cause of action, because Franklin County had a permit of some kind, *notwithstanding it might be invalid. Id.* at *7. Franklin County also contended Sierra Club's section 304(a)(3) suit was not ripe, because Franklin Power alleged it could not violate any PSD requirements until it actually began constructing its power plant. *Id.*

Franklin Power's challenges to Sierra Club's section 304(a)(3) suit are substantially identical to challenges TXU asserted against CleanCOALition's section 304(a)(3) claims in this matter, and overlap challenges TXU asserted against CleanCOALition's section 304(a)(1) claims. As discussed below, the Seventh Circuit rejected the challenges, and in so doing, effectively

endorsed several of CleanCOALition's contentions in this matter. Moreover, because the United States Court of Appeals for the Fifth Circuit adopted TXU's relevant contentions in this matter, and other circuits have construed CAA section 304(a) like the Fifth Circuit, the Seventh Circuit's holdings create circuit conflicts regarding legal issues that are central to the CAA's proper operation.

B. The Seventh Circuit Has Endorsed CleanCOALition's Contention that Section 304(a)(3) Authorizes Suit against Entities that Propose to Construct Facilities with Invalid Permits

As indicated above, Franklin Power contended section 304(a)(3) does not create a cause of action as long as a person proposes to construct a power plant with a PSD permit of some kind. *See* 2008 WL 4693519 at *7 ("[Franklin Power] argue[s] that the citizen suit provision that Sierra Club relies upon, section [304(a)(3)], only allows suits against entities that are 'without a permit,' so Sierra Club cannot bring this suit because [Franklin Power] received a permit (albeit one that may no longer be valid)"). Franklin Power's contention is materially identical to TXU's "any permit in a storm" contention in this matter.

By way of illustration, the PSD program requires persons to comply with the conditions and requirements found under part C of subchapter I of the CAA (CAA sections 160-169) *before* a person can obtain a *valid* PSD permit. *See, e.g.*, Petition, pp. 7-8, 22 n.18. TXU did not complete the pre-permit, environmental and technical

analyses that correspond with the PSD conditions and requirements. *See* Petition, pp. 8, 12, 24. TXU consequently did not make the necessary "demonstration" that is a prerequisite to a valid PSD permit. *Id.*[2]

CleanCOALition sued TXU under CAA section 304(a)(3), contending TXU was "propos[ing] to construct . . . [a CAA] facility without a permit required under part C of subchapter I of [the CAA] . . . ." 42 U.S.C. § 7604(a)(3). TXU challenged the validity of CleanCOALition's suit by arguing section 304(a)(3) provides a cause of action only when a person intends to construct a facility *with no permit at all*, but not when the person proposes to construct a facility with an allegedly invalid permit. *See* Petition, p. 28.

In *Sierra Club*, the Seventh Circuit rejected the nearly identical contention asserted by Franklin Power, because: "even if having an expired [thus invalid] permit were akin to having no permit at all, Sierra Club would still be able to sue under section [304(a)(3)], which enables citizens to sue entities like [Franklin Power] that '*propose[] to construct* . . . new or modified major

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[2] The PSD provisions impose obligations on the person seeking a PSD permit (not just a state agency evaluating whether to issue a permit). The citizen suit provisions therefore are designed to hold accountable persons who fail to fulfill PSD obligations. *See* Petition, pp. 7-8. This, incidentally, was a basis upon which CleanCOALition challenged the application of the *Burford* abstention doctrine in the district court, because citizen suits challenging a person's PSD violations are not matters over which state courts have greater expertise than federal courts. Indeed, there are no identifiable, reported cases in which a CAA citizen suit has been heard by a Texas state court.

emitting facilit[ies] without a [PSD] permit.'" 2008 WL 4693519 at *7 (quoting 42 U.S.C. § 7604(a)(3)).

This holding is particularly germane in this matter, because Franklin Power, like TXU, vigorously defended the validity of its PSD permit. *Id.* at **5, 9-13.[3] The ultimate determination on the validity of the PSD permit was not, however, material in considering whether Sierra Club *pleaded* a viable section 304(a)(3) claim.

Indeed, the Seventh Circuit flatly rejected Franklin Power's contention that a section 304(a)(3) suit could not be viable until the IEPA conclusively determined whether Franklin Power's PSD permit was invalid. *Id.* at **7-8 ("[Franklin Power] cite[s] no direct support for this position, instead claiming the matter is not ripe and cannot be adjudicated until the IEPA issues a final decision whether the . . . permit has expired. . . . It is irrelevant that the IEPA has yet to finish deciding whether the . . . permit is *invalid because that's not what section [304(a)(3)] requires.*") (emphasis added).

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[3] Here, CleanCOALition contended no PSD permit TXU might receive would be valid, because TXU did not fulfill PSD conditions and requirements that are absolute pre-requisites to a valid permit. Accordingly, TXU was not (at the time) defending the validity of a PSD permit that had been issued. TXU instead contended it was not guilty of PSD violations that would invalidate its permit once issued. The holding from *Sierra Club* nonetheless is relevant, because under either scenario, section 304(a)(3) is intended to authorize suit when a plaintiff *alleges* a defendant *proposes* to construct a plant without a valid PSD permit. As discussed below, the actual validity or invalidity of the PSD permit does not have to be resolved before a determination is made whether a section 304(a)(3) claim is proper.

Although the Seventh Circuit ultimately concluded the permit actually was invalid, this was not a necessary pre-condition to its holding that Sierra Club had asserted a viable section 304(a)(3) claim.

Sierra Club therefore stands for the proposition that a person states a viable section 304(a)(3) claim by *alleging* an entity *proposes* to construct a regulated facility without a valid FSD permit. This proposition supports CleanCOALition's contentions regarding the proper operation of section 304(a)(3) and creates a circuit conflict with, at minimum, the Fifth Circuit's contrary holding. *See* Petition Appx. Exhibit A, pp. 22a-23a.

CleanCOALition therefore respectfully submits review on a writ of certiorari is appropriate.

C. The Seventh Circuit Has Endorsed CleanCOALition's Contention that PSD Requirements Can Be Violated and Are Actionable Even before a Facility Is Constructed

A fundamental question that should be resolved in this matter is whether Congress's objectives under the CAA are served by allowing pre-permit suits or whether it is sufficient to limit plaintiffs to filing suit only after a PSD permit has been issued, and a facility has been constructed or become operational. *Cf. Comm'r of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984) (holding a court's "duty . . . is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.") (internal quotations omitted).

CleanCOALition has argued (with respect to both its section 304(a)(3) and 304(a)(1) claims) that the CAA's objectives can be served only if pre-permit suits are allowed. Otherwise, there is no meaningful window of opportunity for citizens to stop persons from constructing non-complaint plants, because (according to some authorities) even before a person obtains a PSD permit, the person can undertake "a good deal of activity" towards construction of a plant. *See, e.g., Hempstead County Hunting Club v. Sw. Elec. Power Co.*, No. 08-CV-4038, 2008 WL 2705570, **2-3 (W.D. Ark. 2008). Accordingly, once a person actually obtains a PSD permit, there may be little time before the plant is completed. At that point, little (if anything) can be done to prevent the plant from operating in a manner that violates the CAA.[4]

In *Sierra Club*, the Seventh Circuit generally acknowledged that meaningful enforcement of the CAA cannot occur unless citizens are allowed to enforce PSD requirements sooner rather than later. *See, e.g.*, 2008 WL 4693519 at *5 ("As a practical matter, it [made] sense for Sierra Club to challenge the validity of [Franklin Power's] permit now, rather than waiting until the plant [became] operational."). Other holdings from *Sierra Club* also support CleanCOALition's contentions regarding the proper operation of CAA section 304(a)(3) and 304(a)(1) and otherwise create conflicts with relevant holdings from other circuits.

[4] The prospect of civil penalties remains, but penalties (although appropriate) will not stop the plant from emitting pollutants at a rate or in a manner that may conflict with PSD mandates. Hence, forever lost is the opportunity to enforce the CAA as Congress intended, i.e., "to protect and enhance the quality of the Nation's air resources . . . ." 42 U.S.C. § 7401(b)(1).

1. The Seventh Circuit's holding supports CleanCOALition's construction of section 304(a)(3) and creates a conflict between circuits

As discussed above, Franklin County contended Sierra Club's section 304(a)(3) suit was not ripe, because Franklin Power alleged it could not violate PSD requirements until it actually began constructing its power plant. *See* 2008 WL 4693519 at *7. Here again, this is precisely what is at issue in this matter, because the Fifth Circuit held CleanCOALition's claims cannot be premised on preconstruction PSD conditions and requirements. *See, e.g.*, Petition Appx. Exhibit A, p. 20a ("the Eleventh Circuit has held, following a long line of district court cases, that 'violations of the preconstruction permitting requirements *occur at the time of construction.*'") (emphasis added).[5]

In its Petition, CleanCOALition discussed the flawed reasoning underlying the Fifth Circuit's holding, particularly with reference to the Fifth Circuit's reliance on a case styled *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650 (W.D.N.Y. 2003). *See* Petition, p. 26 n.23. The Fifth Circuit mistakenly relied on holdings from *Niagara Mohawk Power Corp.* and related cases regarding when a statute of limitations begins to run on a CAA citizen suit, but those holdings offered no

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[5] The Fifth Circuit was addressing CleanCOALition's section 304(a)(1) claim, as opposed to its section 304(a)(3) claim. Regardless, the principle of law, as opposed to the specific statutory provision, is controlling in this analysis, because the principle will inform the operation of both section 304(a)(1) and 304(a)(3). *See infra* pp. 11-12.

insight regarding when a CAA citizen suit becomes ripe (i.e. whether a suit can be based on preconstruction PSD violations). *See* Petition, p. 26 n.23.

In *Sierra Club*, the Seventh Circuit likewise rejected that *Niagara Mohawk Power Corp.* and related cases dictate when suits based on PSD violations become ripe:

> [Franklin Power] misread[s] these cases, which specify when the limitations period begins for claims that a company has violated a preconstruction permitting requirement. In that context, it makes sense to conclude that the *last* possible moment at which a preconstruction violation occurs is "when the actual construction is commenced, and not at some later point in time." . . . . But it does not logically follow (nor do these cases suggest) that a preconstruction permit violation cannot occur *until* actual construction begins.

2008 WL 4693519 at *7.

This holding supports CleanCOALition's contention that PSD violations can occur before a facility is constructed and creates a circuit conflict with, at minimum, the Fifth Circuit's holding to the contrary. *See* Petition Appx. Exhibit A, p. 20a.

2. The Seventh Circuit's holding indirectly supports CleanCOALition's construction of section 304(a)(1) and creates conflicts between circuits

The Seventh Circuit's holding regarding the timing of PSD violations also supports CleanCOALition's contentions regarding the proper operation of CAA section 304(a)(1) and creates circuit conflicts with the United States Courts of Appeals for the Second and Fourth Circuits, as well as the Fifth Circuit. The Second and Fourth Circuits respectively have held PSD conditions and requirements cannot be violated and are not actionable until a CAA facility becomes operational or is at least constructed. *See Weiler v. Chatham Forest Prods., Inc.*, 392 F.3d 532, 538 (2d Cir. 2004); *Sugarloaf Citizens Ass'n v. Montgomery County*, No. 93-2475, 1994 WL 447442, at *8 n.9 (4th Cir. Aug. 17, 1994) (unpublished).

These holdings conflict with the Seventh Circuit's holding that PSD violations can occur prior to construction. Admittedly, the Seventh Circuit was evaluating a section 304(a)(3) claim, whereas in *Weiler* and *Sugarloaf Citizens Association*, the Second and Fourth Circuits where analyzing whether PSD violations could warrant a section 304(a)(1) claim before a power plant began operations or was constructed. This distinction is, however, immaterial, because in both contexts, the fundamental issue is whether PSD requirements can be violated, thus actionable, before a plant is operational or constructed. 392 F.3d at 538; 1994 WL 447442 at *8 n.9. The nature of the section 304(a) suit would not appear to alter that the Seventh Circuit

will allow section 304(a) suits based on preconstruction PSD violations whereas the Second and Fourth Circuits will not.[6]

The Fifth Circuit, in this matter, purportedly declined to address whether it will allow a section 304(a) suit prior to construction of a plant, *see* Petition Appx. Exhibit A, p. 20a n.11,[7] but it (like the Second and Fourth Circuits) did disregard that the CAA is structured such that PSD conditions and requirements create pre-permit obligations that can be violated, and are actionable, before a PSD permit is issued or construction begins.

The Seventh Circuit's holding therefore indirectly supports CleanCOALition's construction of section 304(a)(1), creates a direct conflict with the Second and Fourth Circuit's holdings that PSD violations are not actionable before operations or construction, and implicates a conflict with the Fifth Circuit's holding that pre-permit PSD violations are not actionable. CleanCOALition therefore respectfully submits review on a writ of certiorari is appropriate.

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[6] For instance, in *Sugarloaf*, the PSD conditions and requirements were characterized as emissions standards and limitations as that term is used in CAA section 304(a)(1) and further defined in CAA section 304(f), 42 U.S.C. § 7604(f). In CleanCOALition's section 304(a)(1) claim, it has contended TXU violated PSD conditions and requirements incorporated as emissions standards and limitations under CAA section 304(f)(3). The Seventh Circuit apparently would permit such a claim whereas it would not be permissible under the Fourth Circuit's holding in *Sugarloaf*.

[7] It nevertheless strongly suggested it will not, by holding PSD violations do not occur until construction begins. *See* Petition Appx. Exhibit A, p. 20a.

CONCLUSION

For the reasons discussed in the Petition and raised herein, Petitioners CleanCOALition and Robertson County: Our Land, Our Lives respectfully request that the Court grant its Petition.

Respectfully submitted,

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